Managing Conflict of Interest in the Public Service

OECD GUIDELINES AND COUNTRY EXPERIENCES

OECD

Managing Conflict of Interest in the Public Service

OECD Guidelines and Overview

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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Pursuant to Article 1 of the Convention signed in Paris on 14th December 1960, and which came into force on 30th September 1961, the Organisation for Economic Co-operation and Development (OECD) shall promote policies designed:

- to achieve the highest sustainable economic growth and employment and a rising standard of living in member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
- to contribute to sound economic expansion in member as well as non-member countries in the process of economic development; and
- to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

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Gérer les conflits d'intérêt dans le service public

Lignes directrices de l'OCDE et expériences nationales

Foreword

Ensuring that the integrity of official decision-making is not compromised by public officials' private interests is a growing public concern. To answer that concern, the OECD surveyed the policies and practices of member countries and developed practical instruments for governments to modernise their conflict-of-interest policies. Based on the experiences of all 30 OECD member countries, this report presents the OECD Guidelines for Managing Conflict of Interest, *the first international benchmark for a comprehensive review. A comparative overview highlights trends, approaches and models across OECD countries. And case studies provide more details on policy approaches, the key elements of legal and institutional frameworks and how the policy is implemented. The countries covered are Australia, Canada, France, Germany, New Zealand, Poland, Portugal and the United States.*

The OECD Guidelines *were developed in collaboration with the Expert Group on Conflicts of Interest under the chairmanship of Howard R. Wilson, Ethics Counsellor of the Government of Canada, and under the direction of the OECD Public Management Committee. The OECD Council endorsed the Guidelines in the form of a Council Recommendation in June 2003.*

The report was prepared by János Bertók of the OECD Public Governance and Territorial Development Directorate, who would like to thank Neda Mansouri for her preparatory work and Howard Whitton for his continuous advice in the drafting process. The report is published under the responsibility of the Secretary-General of the OECD.

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Preface

In the private sector, inadequately managed conflicts of interest, some not previously identified, have been a major cause of the recent corporate governance shortcomings. These were identified by the OECD Informal Roundtable on Corporate Governance and Market Integrity that I chaired in November 2002.

Looking at the public sector, the same holds true. It is not feasible to identify all possible forms of conflict of interest in advance and simply prohibit them. Instead, the primary task for governments and public organisations should be to recognise risks to good governance arising from conflict of interest, and put in place robust measures for ensuring that conflicts of interest which arise are rapidly identified and resolved appropriately.

The OECD *Guidelines for Managing Conflict of Interest in the Public Service* comprise the first international standard to help governments review and modernise their conflict of interest policies for the public sector. The Guidelines set comprehensive standards for policy design and implementation, and encourage partnership between the public sector and the business and non-profit sectors by suggesting the responsibilities of each sector for improving integrity and strengthening the business environment.

Based on the OECD's survey of member countries' experiences and case studies, this report outlines policy options that can be adopted to the administrative and legal contexts of particular countries. It also sets out examples of good practice and innovative solutions.

OECD Governments demonstrated their commitment in this crucial area of governance by approving the Guidelines as an OECD Recommendation in June 2003, and undertaking to report on progress in the implementation of the Recommendation in 2006.

This report supports governments in their efforts to meet growing public expectations for strengthening integrity in government and in public institutions.

Donald J. Johnston

Secretary-General of the OECD

Executive Summary

Managing conflict of interest: The OECD Guidelines

Managing conflict of interest is a major challenge for governance…

Conflicts of interest in both the public and private sectors have become a major matter of public concern worldwide. An increasingly commercialised public sector that works closely with the business and non-profit sectors gives rise to the potential for new forms of conflict between the individual private interests of public officials and their public duties. In the private sector conflicts of interest have been identified as a major cause behind recent corporate governance shortcomings. When conflict-of-interest situations are not properly identified and managed, they can seriously endanger the integrity of organisations and result in corruption in the public sector and private sector alike.

… and key for improving the business climate and preventing corruption

Growing expectations from an increasingly well-informed society and business community together with a general demand for unbiased and transparent public decision-making, put pressure on governments to ensure that public officials perform their duties in a fair and unbiased way, and that official decisions are not improperly affected by self-interest, so that the integrity of markets and fair business competition is supported, and corrupt practices are excluded.

This OECD report outlines trends and presents practical examples of good practice…

Defining an effective policy approach to dealing with conflict of interest is essential to the political, administrative and legal structure of a country's public life. The present OECD report provides, for the first time, a comparative

overview of models and solutions in place in 30 member countries to identify and resolve conflict-of-interest situations in the public service. Based on the OECD survey, the report compares overall trends, identifies good practices and analyses emerging areas in which further work could be appropriate. Selected country case studies review national practices on how particular solutions fit into a country's political, administrative and legal contexts.

… to provide a generic framework of reference

The report recognises the importance of the specific national contexts for policy: there is not a single "one size fits all" solution. Consequently, the Guidelines, together with the comparative overview and selected country case studies, provide a comprehensive reference for public institutions seeking to ensure integrity in public decision-making.

OECD has developed Guidelines for Managing Conflict of Interest in the Public Service

The preparation of the OECD Guidelines for Managing Conflict of Interest in the Public Service recognised the desirability of establishing a set of core principles, policy frameworks and institutional strategies for managing conflict-of-interest matters in the public service. The Guidelines were approved in the form of an OECD Recommendation to assist the efforts of OECD member countries in setting principles and benchmarks in this critical dimension of ensuring good public governance.

The Guidelines set the first international benchmarks for designing and implementing a comprehensive conflict-of-interest policy

The Guidelines help government institutions to develop and implement an effective conflict-of-interest policy that fosters public confidence in the integrity of public officials and public decision-making. The Guidelines:

- Provide a practical framework of reference for reviewing existing policy solutions and modernising mechanisms in line with good practices in OECD countries.
- Promote a public service culture in which conflicts of interest are properly identified and resolved or managed, in an appropriately transparent and timely way, without unduly inhibiting the effectiveness and efficiency of the public organisations concerned.

- Support partnerships between the public sector and the business and non-profit sectors, in accordance with clear public standards defining the parties' responsibilities for integrity.

A hands-on definition of what constitutes a "conflict of interest"

In order to assist the clear, objective and effective identification of conflict-of-interest situations, the Guidelines adopted a definitional approach which is deliberately simple and practical. A "conflict of interest" is:

> A conflict between the public duty and private interests of public officials, in which public officials have private-capacity interests which could improperly influence the performance of their official duties and responsibilities.

Developing the policy framework: Approach and principles

Why the focus on "managing" conflict of interest?

In rapidly changing public sector environments, conflicts of interest will always be an issue for concern. A too-strict approach to controlling the exercise of private interests may conflict with other rights, or be unworkable or counter-productive in practice by deterring experienced and competent potential candidates from seeking public office. A modern approach to conflict-of-interest policy seeks to strike a balance, by:

- Identifying risks to the integrity of public organisations and public officials.
- Prohibiting specific unacceptable forms of private interest.
- Making public organisations and individual officials aware of the circumstances in which conflicts can arise.
- Ensuring that effective procedures are deployed for the identification, disclosure, management, and promotion of the appropriate resolution of conflict-of-interest situations.

A sound strategy with the right approach combines the different measures into a comprehensive policy

The recommended measures are intended to reinforce each other to provide a coherent and consistent approach to managing conflict-of-interest situations.

In addition to the general policy for all public officials, senior positions and sensitive areas need particular attention

The report presents the experience of OECD countries and is aimed at helping central governments to review and modernise existing conflict-of-interest policy and practice relevant to the national public administration. In addition, these experiences can also provide general guidance for other branches of government, sub-national level government and state-owned corporations. A sound conflict-of-interest policy pays particular attention to:

- Policy-makers and public office holders working in the most senior positions.
- Public officials working in key functions of the state, such as law enforcement.
- Decision-makers in sensitive areas at the interface between the public and private sector.

Core principles provide a solid basis to guide officials in the application of the policy

Core principles guide public officials in the application of integrity standards. Public officials can be expected to observe the following core principles in dealing with conflict-of-interest matters:

- Serving the public interest.
- Supporting transparency and scrutiny.
- Promoting individual responsibility and personal example.
- Engendering an organisational culture which is intolerant of conflicts of interest.

Crucial elements of the conflict-of-interest policy

A clear and realistic description of what can lead to a conflict-of-interest situation

The financial or pecuniary interests of officials are generally considered as the principal causes of conflict of interest. However, a forward-looking policy should also describe examples of other causes, such as related-party business undertakings, personal relationships and non-financial personal interests that

can be relevant in a very complex public sector environment. In addition, affiliations with for-profit or non-profit organisations, or with political or professional organisations, can also give rise to new and difficult examples of conflict. Public organisations have the primary responsibility to define particular situations and activities that are incompatible with their public function.

Develop organisational strategies and practices that identify the variety of conflict-of-interest situations

While laws and codes, as primary sources, can establish definitions, principles and essential procedural requirements of a conflict-of-interest policy, guidelines, training materials, advice and counselling should also be used to provide practical examples and concrete steps to be taken for identifying and resolving conflict-of-interest situations, especially in rapidly-changing or "grey" areas such as private-sector sponsorship, public-private partnerships, interchange of personnel between sectors, NGO relations, and party-political activity by individuals.

Ensure that public officials know what is required of them to disclose details on conflicting private interest…

Organisational procedures should enable public officials to identify and disclose relevant private interests that potentially conflict with their official duties. Such procedures should make public officials aware that they must promptly disclose all relevant information about a conflict when taking up office (initial disclosure), and later, when relevant circumstances change (in-service disclosure). An effective disclosure process ensures that the responsibility for providing sufficient details on the conflicting interest rests with individual officials, and this requirement is explicitly communicated in employment and appointment arrangements and contracts.

… that enables managers to find proper resolution and management options

Disclosure of a private interest does not in itself resolve a conflict, however, it enables the necessary steps to be taken to determine what measures are needed to resolve or manage the conflict positively. These options could range from divestment, recusal or restriction of activity (through transfer and other re-arrangements), up to resignation, if the conflict of interest cannot be resolved in any other way. Organisations need to clearly record both disclosed

private interests and the measures taken in a particular case for resolution to demonstrate that a specific conflict has been appropriately identified and managed.

Implementing the policy framework: Management measures

Demonstrate leadership commitment

Senior officials set a personal example to others when they arrange their private-capacity interests in a manner that preserves public confidence in their integrity and the integrity of their organisation. The interests of the organisation, the public interest, and the legitimate interests of the employee must be balanced when managers seek to resolve or manage an actual conflict situation.

Create a partnership with employees …

The wide publication of the organisation's rules and procedures, and provision of advice to public officials, who are in doubt, are needed to support the effective application of the policy. Discussions involving staff, either in training or in the actual workplace, where real-world examples are considered, can be used to improve skills in identifying and resolving conflicts in day-to-day work.

… that develops an open organisational culture

An open management culture would encourage employees to take part in the review of existing conflict-of-interest policy and practice: consultation with staff on future prevention measures can build a common understanding of the issues, and can also create an organisational culture where dealing with conflict-of-interest matters can be freely raised and discussed.

Review "at-risk" areas

Organisations need to consider reviewing existing management arrangements on a regular basis, to assess whether they remain adequate in recognising potential risk areas. Changing practices and expectations, for example in areas such as additional employment and "outside" appointments, post-public employment, use of "inside" information, public contracts, new forms of gifts and other benefits, and different family and community expectations in a multicultural context, can generate new forms of risk.

Preventive measures for emergent conflicts and…

A forward-looking management anticipates potential conflict situations and employs preventive measures that deal with emergent conflict situations, such as screening applicants before employment, and the adoption of meeting procedures that ensure that official decision-making is not compromised. Regular assessment of the effectiveness of policy implementation enables the upgrading of mechanisms and procedures to ensure their continuing relevance to a constantly evolving situation.

… strong enforcement with control and real sanctions are the fundamentals of the policy

Monitoring mechanisms, such as management and internal controls and external audit, can be used to detect breaches of policy and take into account any consequences that resulted from the conflict. In case of non-compliance, proportional enforceable sanctions, in the form of disciplinary measures or prosecution which affect the appointment or career of the public official concerned, could provide evidence of the organisation's commitment to upholding its integrity policy. Complementary management measures which provide effective redress for breaches of the policy, in the form of retroactive cancellation of affected decisions or tainted contracts, and exclusion of the beneficiaries from future contracts, can also be adopted.

Successful implementation depends on co-ordination of prevention and enforcement measures

Effective co-ordination of preventive measures and positive enforcement is a key element of successful implementation. The coherent integration of these measures into the existing legal, institutional and procedural frameworks promotes an organisational culture where conflicts of interest are properly identified and resolved or managed appropriately without unduly inhibiting efficiency.

Encourage new co-operation with the business and non-profit sectors

The business and non-profit sectors can play a crucial role in keeping the policy up-to-date in the context of increasing co-operation with public

organisations. The Guidelines advocate promoting integrity in partnership with the business and non-profit sectors by:

- Providing clear public standards that define the parties' responsibilities for integrity.
- Supporting the involvement of business and non-profit sectors in the development and implementation of conflict-of-interest policy for public officials.

From policy to practice

OECD is developing management tools…

In order to help the implementation of policy standards the OECD is developing and testing *Conflict of Interest Management Tools*. These forthcoming tools provide a set of practical management strategies and processes that help managers put the Guidelines into practice.

… that also assist dialogue with non-members

The OECD Guidelines, together with the report and practical management tools, are the first international comprehensive reference in this key area of governance. The report, Guidelines and management tools can also be deployed to promote good governance in non-OECD countries, particularly in transition economies in Central Eastern Europe, in Asia-Pacific and Latin America, by providing a benchmark for non-member countries against which policy-makers and managers can compare, assess and further develop existing policies.

Reporting back on progress and emerging issues in 2006

The 2003 OECD *Recommendation on Guidelines for Managing Conflict of Interest in the Public Service* requests the Public Management Committee to report back to the Council on progress made by member countries in implementing the Recommendation. To answer this request, a new report, scheduled for 2006, will analyse how the Guidelines are applied in very rapidly changing public sector environments and will also review developments in emerging areas such as public-private partnership, sponsorship, lobbying and employment after public office or institutional conflict of interest.

PART I

OECD Guidelines for Managing Conflict of Interest in the Public Service

Part I presents the OECD Guidelines for Managing Conflict of Interest in the Public Service. *These Guidelines set the first international benchmark to help governments review and develop comprehensive conflict-of-interest policies for the public sector in line with good practices in OECD countries.*

MANAGING CONFLICT OF INTEREST IN THE PUBLIC SERVICE – ISBN 92-64-10489-5 – © OECD 2003

A. A growing public concern

Serving the public interest is the fundamental mission of governments and public institutions. Citizens expect individual public officials to perform their duties with integrity, in a fair and unbiased way. Governments are increasingly expected to ensure that public officials do not allow their private interests and affiliations to compromise official decision-making and public management. In an increasingly demanding society, inadequately managed conflicts of interest on the part of public officials have the potential to weaken citizens' trust in public institutions.

Conflicts of interest in both the public and private sectors have become a major matter of public concern world-wide. In government and the public sector, conflict-of-interest situations have long been the focus of specific policy; legislation and management approaches intended to maintain integrity and disinterested decision-making in government and public institutions. In the private sector there has also been a long history of concern for integrity in business, and in particular for protecting the interests of shareholders and the public at large. Recent scandals have drawn attention to the importance of avoiding conflicts of interest which can become an issue when, for example, a public official leaves public office for employment in the business or NGO sector, or an accounting firm offers both auditing and consulting services to the same client, or a regulatory agency becomes too closely aligned to the business entities it is intended to supervise.

New forms of relationship have developed between the public sector and the business and non-profit sectors, giving rise for example to increasingly close forms of collaboration such as public/private partnerships, self-regulation, interchanges of personnel, and sponsorships. New forms of employment in the public sector have also emerged with potential for changes to traditional employment obligations and loyalties. In consequence, there is clearly an emerging potential for new forms of conflict of interest involving an individual official's private interests and public duties, and growing public concern has put pressure on governments to ensure that the integrity of official decision-making is not compromised.

While a conflict of interest is not *ipso facto* corruption, there is increasing recognition that conflicts between the private interests and public duties of public officials, if inadequately managed, can result in corruption. The proper objective of an effective conflict-of-interest policy is not the simple

prohibition of all private-capacity interests on the part of public officials, even if such an approach were conceivable. The immediate objective should be to maintain the integrity of official policy and administrative decisions and of public management generally, recognising that an unresolved conflict of interest may result in abuse of public office.

This objective can generally be achieved by ensuring that public bodies possess and implement relevant policy standards for promoting integrity, effective processes for identifying risk and dealing with emergent conflicts of interest, appropriate external and internal accountability mechanisms, and management approaches – including sanctions – that aim to ensure that public officials take personal responsibility for complying with both the letter and the spirit of such standards.

Traditionally, the different approaches to managing conflict-of-interest situations which have been taken by member countries have reflected their different historical, legal and public service traditions. Institutional measures such as positive external audit and verification, or other internal supervisory approaches, do have a place in the management of conflict situations. Other measures, such as limited or full publication of disclosed interests and/or the development of a strong management culture supporting integrity may also be effective.

B. Managing conflict of interest

In a rapidly changing public sector environment, conflicts of interest will always be an issue for concern. A too-strict approach to controlling the exercise of private interests may be in conflict with other rights, or be unworkable or counter-productive in practice, or may deter some people from seeking public office altogether. Therefore a modern conflict-of-interest policy should seek to strike a balance, by identifying risks to the integrity of public organisations and public officials, prohibiting unacceptable forms of conflict, managing conflict situations appropriately, making public organisations and individual officials aware of the incidence of such conflicts, ensuring effective procedures are deployed for the identification, disclosure, management, and promotion of the appropriate resolution of conflict-of-interest situations.

Aims of the guidelines

The primary aim of the Guidelines is to help member countries, at central government level, consider existing conflict-of-interest policy and practice relating to public officials – including public servants/civil servants, employees, and holders of public office – who work in the national public administration. The Guidelines can also provide general guidance for other

branches of government, sub-national level government, and state-owned corporations.

In particular, the Guidelines reflect policies and practices that have proved effective in OECD countries, and are intended to:

- Help government institutions and agencies to develop an effective conflict-of-interest policy that fosters public confidence in their integrity, and the integrity of public officials and public decision-making.
- Create a practical framework of reference for reviewing existing solutions and modernising mechanisms in line with good practices in OECD countries.
- Promote a public service culture where conflicts of interest are properly identified and resolved or managed, in an appropriately transparent and timely way, without unduly inhibiting the effectiveness and efficiency of the public organisations concerned.
- Support partnerships between the public sector and the business and non-profit sectors, in accordance with clear public standards defining the parties' responsibilities for integrity.

Defining a "conflict of interest"

Historically, defining the term "conflict of interest" has been the subject of many and varying approaches. As all public officials have legitimate interests which arise out of their capacity as private citizens, conflicts of interest cannot simply be avoided or prohibited, and must be defined, identified, and managed. These Guidelines adopt a definitional approach which is deliberately simple and practical to assist effective identification and management of conflict situations, as follows:

> *A "conflict of interest" involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities.*

Defined in this way, "conflict of interest" has the same meaning as "actual conflict of interest". A conflict-of-interest situation can thus be current, or it may be found to have existed at some time in the past.

By contrast, an *apparent* conflict of interest can be said to exist where it *appears* that a public official's private interests could improperly influence the performance of their duties *but this is not in fact the case*. A *potential* conflict arises where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (*i.e.* conflicting) official responsibilities in the future.

Where a private interest has *in fact* compromised the proper performance of a public official's duties, that specific situation is better regarded as an instance of misconduct or "abuse of office", or even an instance of corruption, rather than as a "conflict of interest".

In this definition, "private interests" are not limited to financial or pecuniary interests, or those interests which generate a direct personal benefit to the public official. A conflict of interest may involve otherwise legitimate private-capacity activity, personal affiliations and associations, and family interests, if those interests could reasonably be considered likely to influence improperly the official's performance of their duties. A special case is constituted by the matter of post-public office employment for a public official: the negotiation of future employment by a public official prior to leaving public office is widely regarded as a conflict-of-interest situation.

Defined in this way, conflict of interest is the focus of these Guidelines

- Public officials should avoid private-capacity action which could derive an improper advantage from "inside information" obtained in the course of official duties, where the information is not generally available to the public, and are required not to misuse their position and government resources for private gain.
- Public officials should not seek or accept any form of improper benefit in expectation of influencing the performance or non-performance of official duties or functions.
- Public officials are expected not to take improper advantage of a public office or official position which they held previously, including privileged information obtained in that position, especially when seeking employment or appointment after leaving public office.

Supporting transparency and scrutiny

- Public officials and public organisations are expected to act in a manner that will bear the closest public scrutiny. This obligation is not fully discharged simply by acting within the letter of the law; it also entails respecting broader public service values such as disinterestedness, impartiality and integrity.
- Public officials' private interests and affiliations that could compromise the disinterested performance of public duties should be disclosed appropriately, to enable adequate control and management of a resolution.
- Public organisations and officials should ensure consistency and an appropriate degree of openness in the process of resolving or managing a conflict-of-interest situation.
- Public officials and public organisations should promote scrutiny of their management of conflict-of-interest situations, within the applicable legal framework.

Promoting individual responsibility and personal example

- Public officials are expected to act at all times so that their integrity serves an example to other public officials and the public.
- Public officials should accept responsibility for arranging their private-capacity affairs, as far as reasonably possible, so as to prevent conflicts of interest arising on appointment to public office and thereafter.
- Public officials should accept responsibility for identifying and resolving conflicts in favour of the public interest when a conflict does arise.
- Public officials and public organisations are expected to demonstrate their commitment to integrity and professionalism through their application of effective conflict-of-interest policy and practice.

Engendering an organisational culture which is intolerant of conflicts of interest

- Public organisations should provide and implement adequate management policies, processes, and practices in the working environment to encourage the effective control and management of conflict-of-interest situations.
- Organisational practices should encourage public officials to disclose and discuss conflict-of-interest matters, and provide reasonable measures to protect disclosures from misuse by others.
- Public organisations should create and sustain a culture of open communication and dialogue concerning integrity and its promotion.
- Public organisations should provide guidance and training to promote understanding and dynamic evolution of the public organisation's established rules and practices, and their application to the working environment.

D. Developing the policy framework

Defining a policy approach to dealing with conflict of interest is an essential part of the political, administrative and legal context of a country's public administration. These Guidelines do not attempt to cover every possible situation in which a conflict of interest might arise, but instead are designed as a general policy and practice reference that is relevant to a rapidly changing social context. The proposed measures are intended to reinforce each other to provide a coherent and consistent approach to managing conflict-of-interest situations. The key functions of this approach are:

- *Definition* of the general features of conflict-of-interest situations which have potential to put organisational and individual integrity at risk.
- *Identification* of specific occurrences of unacceptable conflict-of-interest situations.
- *Leadership and commitment* to implementation of the conflict-of-interest policy.
- *Awareness* that assists compliance, and *anticipation* of at-risk areas for prevention.
- *Appropriate disclosure* of adequate information, and *effective management* of conflicts.
- *Partnerships* with other stakeholders, including contractors, clients, sponsors and the community.
- *Assessment and evaluation* of a conflict-of-interest policy in the light of experience.

- *Redevelopment and adjustment* of *policy* and procedures as necessary to meet evolving situations.

Identify relevant conflict-of-interest situations

Provide a clear and realistic description of what circumstances and relationships can lead to a conflict-of-interest situation

a) The general description of conflict-of-interest situations should be consistent with the fundamental idea that there are situations in which the private interests and affiliations of a public official create, or have the potential to create, conflict with the proper performance of his/her official duties. The description should emphasise the overall aim of the policy – fostering public trust in government institutions.

b) The description should also recognise that, while some conflict-of-interest situations may be unavoidable in practice, public organisations have the responsibility to define those particular situations and activities that are incompatible with their role or public function because public confidence in the integrity, impartiality, and personal disinterestedness of public officials who perform public functions could be damaged if a conflict remains unresolved.

c) The policy should give a range of examples of private interests which could constitute conflict-of-interest situations: financial and economic interests, debts and assets, affiliations with for-profit and non-profit organisations, affiliations with political, trade union or professional organisations, and other personal-capacity interests, undertakings and relationships (such as obligations to professional, community, ethnic, family, or religious groups in a personal or professional capacity, or relationships to people living in the same household).

d) More focused examples of unacceptable conduct and relationships should be provided for those groups that are working in at-risk areas, such as the public-private sector interface, government procurement, regulatory and inspectorial functions, and government contracting. Specific attention needs to be given to functions which are subject to close public scrutiny or media attention.

Ensure that the conflict-of-interest policy is supported by organisational strategies and practices to help with identifying the variety of conflict-of-interest situations

a) Laws and codes, as primary sources, should state the necessary definitions, principles and essential requirements of the conflict-of-interest policy.

b) In addition, guidelines and training materials, as well as advice and counselling, should provide practical examples of concrete steps to be taken

for resolving conflict-of-interest situations, especially in rapidly-changing or "grey areas" such as private-sector sponsorships, privatisation and deregulation programmes, NGO relations, political activity, public-private partnerships and the interchange of personnel between sectors.

Establish procedures for identifying, managing and resolving conflict-of-interest situations

Ensure that public officials know what is required of them in relation to identifying and declaring conflict-of-interest situations

a) *Initial disclosure on appointment or taking up a new position* – Develop procedures that enable public officials, when they take up office, to identify and disclose relevant private interests that potentially conflict with their official duties. Such disclosure is usually formal, (by means of *registration* of information identifying the interest), and is required to be provided periodically, (generally on commencement in office and thereafter at regular intervals, usually annually), and in writing. Disclosure is not necessarily required to be a public process: internal or limited-access disclosure within the public organisation, together with appropriate resolution or management of any conflicts, may be sufficient to achieve the policy objective of the process – encouraging public confidence in the integrity of the public official and their organisation. In general, the more senior the public official, the more likely it is that public disclosure will be appropriate; the more junior, the more likely it is that internal disclosure to the management of the official's organisation will be sufficient.

b) *In-service disclosure in office* – Make public officials aware that they must promptly disclose all relevant information about a conflict when circumstances change after their initial disclosure has been made, or when new situations arise, resulting in an emergent conflict of interest. As with formal registration, *ad hoc* disclosure itself is not necessarily required to be a public process: internal declaration may be sufficient to encourage public confidence that integrity is being managed appropriately.

c) *Completeness of disclosure* – Determine whether disclosures of interests contain sufficient detail on the conflicting interest to enable an adequately-informed decision to be made about the appropriate resolution. The responsibility for the adequacy of a disclosure rests with the individual public official.

d) *Effective disclosure process* – Ensure that the organisation's administrative process assists full disclosure, and that the information disclosed is properly assessed, and maintained in up-to-date form. It is appropriate that the responsibility for providing adequate disclosure of relevant information should rest with individual officials. Ensure that the responsibility for

providing relevant information rests with individual officials and this requirement is explicitly communicated and reinforced in employment and appointment arrangements and contracts.

Set clear rules on what is expected of public officials in dealing with conflict-of-interest situations

a) Dealing with conflicting private interests – Public officials should be required to accept responsibility for identifying their relevant private interests. An organisation's policy statement should make it clear that the registration or declaration of a private interest does not in itself resolve a conflict. Additional measures to resolve or manage the conflict positively must be considered.

b) Resolution and management options – Options for positive resolution or management of a continuing or pervasive conflict can include one or more of several strategies as appropriate, for example:

- divestment or liquidation of the interest by the public official;
- recusal of the public official from involvement in an affected decision-making process;
- restriction of access by the affected public official to particular information;
- transfer of the public official to duty in a non-conflicting function;
- re-arrangement of the public official's duties and responsibilities;
- assignment of the conflicting interest in a genuinely "blind trust" arrangement;
- resignation of the public official from the conflicting private-capacity function; and/or
- resignation of the public official from their public office.

c) Recusal and restriction – Where a particular conflict is not likely to recur frequently, it may be appropriate for the public official concerned to maintain their current position but not participate in decision-making on the affected matters, for example by having an affected decision made by an independent third party, or by abstaining from voting on decisions, or withdrawing from discussion of affected proposals and plans, or not receiving relevant documents and other information relating to their private interest. The option of re-assigning certain functions of the public official concerned should also be available, where a particular conflict is considered likely to continue, thereby making *ad hoc* recusal inappropriate. Particular care must be exercised to ensure that all affected parties to the decision know of the measures taken to protect the integrity of the decision-making process where recusal is adopted.

d) Resignation – Public officials should be required to remove the conflicting private interest if they wish to retain their public position and the conflict of interest cannot be resolved in any other way (for example by one or more of the measures suggested above). Where a serious conflict of interest cannot be resolved in any other way, the public official should be required to resign from their official position. The conflict-of-interest policy (together with the relevant employment law and/or employment contract provisions) should provide the possibility that their official position can be terminated in accordance with a defined procedure in such circumstances.

e) Transparency of decision-making – Registrations and declarations of private interests, as well as the arrangements for resolving conflicts, should be clearly recorded in formal documents, to enable the organisation concerned to demonstrate, if necessary, that a specific conflict has been appropriately identified and managed. Further disclosure of information about a conflict of interest may also be appropriate in supporting the overall policy objective, for example by demonstrating how the disclosure of a specific conflict of interest was recorded and considered in the minutes of a relevant meeting.

E. Implementing the policy framework

While it is primarily the responsibility of individual public officials to be aware of possible conflicts of interest, public bodies and government organisations have the responsibility to ensure that the conflict-of-interest policy is implemented effectively. Particular attention needs to be paid to at-risk areas and functions, especially where significant conflicts are more likely to arise or to prove more damaging to organisational integrity and public confidence. In so doing, the potential for overly-complex procedures to discourage compliance should be recognised.

Demonstrate leadership commitment

Leadership

All public officials, particularly more senior public officials and senior managers, should arrange their private-capacity interests in a manner that preserves public confidence in their own integrity and the integrity of their organisation, and sets an example to others. Mere compliance with the letter of the conflict-of-interest policy or law, narrowly interpreted, is not generally sufficient to encourage public confidence in an organisation's integrity.

Commitment – Organisations should take responsibility for the effective application of their conflict-of-interest policy, by:

a) Deciding in individual cases – Managers must be prepared to exercise judgement when dealing with a disclosure of private interests. In particular,

they should consider carefully the larger question of whether a reasonable person who is in possession of the relevant facts would be likely to think that the organisation's integrity was at risk from an unresolved conflict of interest. When determining the most appropriate solution to resolve or manage the actual conflict situation, managers should weigh the interests of the organisation, the public interest, and the legitimate interests of employees, as well as other factors – including in specific cases the level and type of position held by the public official concerned, and the nature of the conflict.

b) Monitoring and evaluating the effectiveness of the policy – Over time, organisations should ensure that the policy remains effective and relevant in dealing with current and anticipated conflicts in a continuously evolving environment, and change or redevelop the policy as necessary.

Create a partnership with employees: awareness, anticipation and prevention

Ensure wide publication and understanding of the conflict-of-interest policy

a) Publish the conflict-of-interest policy – Give all new public officials, upon initial appointment and on taking up a new position or function, a clear and concise statement of the current conflict-of-interest policy.

b) Give regular reminders – Regularly remind public officials of the application of the policy in changing circumstances, and in particular ensure that public officials know how the rules are applied in the organisation and what their own responsibilities are. For example, an organisation's code of conduct can be tailored as a practical instrument for setting and communicating conflict-of-interest standards both to public officials and the wider public.

c) Ensure that rules and procedures are available – Provide up-to-date information about the organisation's policy, rules and administrative procedures relevant to conflict of interest, and clearly establish any additional requirements specific to the organisation.

d) Provide guidance – Support public officials with information and advice, including real-world examples and discussions on how specific conflict situations have been handled in the past and are expected to be handled in the future. In particular, consult with staff on the application of the policy, and ensure that the policy's rationale is understood and accepted.

e) Provide assistance – Identify sources of appropriate assistance for public officials who are in doubt about the application of the policy, and widely publicise how to obtain such advice. Make such advice available to clients of the organisation and others, including contractors, agents, and partnering bodies, to assist stakeholders to be well-informed. Such advice may be

especially valuable to parties who may feel that the public organisation's conflict-of-interest policy is not fully effective but are reluctant to complain formally to the organisation concerned.

Review "at-risk" areas for potential conflict-of-interest situations

a) Additional employment – Define the circumstances, including the required authorisation procedures, under which public officials may engage in ancillary ("outside") employment while retaining their official position.

b) "Inside" information – Make sure that information collected or held by public organisations which is not in the public domain, or information obtained in confidence in the course of official functions, is understood to be privileged, and is effectively protected from improper use or disclosure.

c) Contracts – Consider the circumstances in which the preparation, negotiation, management, or enforcement of a contract involving the public organisation could be compromised by a conflict of interest on the part of a public official within the public organisation.

d) Gifts and other forms of benefit – Consider whether the organisation's current policy is adequate in recognising conflicts of interest arising from traditional and new forms of gifts or benefits.

e) Family and community expectations – Consider whether the organisation's current policy is adequate in recognising conflicts of interest arising from expectations placed on public officials by their family and community, especially in a multicultural context.

f) "Outside" appointments – Define the circumstances, including the required authorisation procedures, under which a public official may undertake an appointment on the board or controlling body of, for example, a community group, an NGO, a professional or political organisation, another government entity, a government-owned corporation, or a commercial organisation which is involved in a contractual, regulatory, partnership, or sponsorship arrangement with their employing organisation.

g) Activity after leaving public office – Define the circumstances, including the required authorisation procedures, under which a public official who is about to leave public office may negotiate an appointment or employment or other activity, where there is potential for a conflict of interest involving the organisation.

Identify preventive measures that deal with emergent conflict situations

a) Meeting procedures – Enable participants in official decision-making to foresee potential conflicts, where feasible: for example by providing

meeting agendas in advance; record in meeting proceedings any conflicts that arise and the measures taken to resolve them.

b) Recusal – Establish clear rules and efficient procedures (for example, a register of interests for board members, advisors and senior management), to ensure that *ad hoc* conflicts of interest are made transparent so that decision-making is not compromised.

c) Screening processes – As part of selection processes, require identification in advance of relevant interests, and discuss possible strategies for resolution of identified conflicts; obtain appropriate clearances (such as tax clearance certificates), declarations or undertakings, to identify and deal with potential conflict-of-interest situations at an early stage.

d) Periodic system assessment – Review the implementation of policy and procedures on a regular basis and update mechanisms and procedures to ensure their relevance to a constantly evolving situation. Consider the relevance of current assumptions – for example concerning the impact of new technology, which makes possible "day-trading" of stocks and shares via the Internet, which in turn could necessitate daily disclosures of an individual's changing pecuniary interests. Draw on surveys of client and partner bodies' experience of risk, where appropriate, partly to engage a broader set of experience, and partly to indicate continuing commitment to the process of risk-management and safeguarding the organisation's integrity.

Develop an open organisational culture where dealing with conflict-of-interest matters can be freely raised and discussed

a) Involve employees, their representatives and other interested parties in the review of existing conflict-of-interest policy. Their opinion, as users, on the daily problems faced in the implementation of the conflict-of-interest policy can substantially contribute to the improvement of existing measures.

b) Consult on future prevention measures to bring a practical aspect into the policy-making process and to build a common understanding that is vital for the implementation of agreed policy.

c) Assist understanding by providing training for public officials to develop an understanding of the relevant general principles and specific rules, and to help them improve decision-making skills for practical application.

d) Provide support mechanisms for assisting managers in reviewing and improving their skills in identifying and resolving or managing conflicts in their day-to-day work.

Enforce the conflict-of-interest policy

Provide procedures for establishing a conflict-of-interest offence, and proportional consequences for non-compliance with conflict-of-interest policy including disciplinary sanctions

a) Personal consequences – Non-compliance with the organisation's conflict-of-interest policy should generally be regarded as, at minimum, a disciplinary matter, while more serious breaches involving an actual conflict could result in sanctions for abuse of office, or prosecution for a corruption offence. Other sanctions may apply to the public official depending on the seriousness of the breach – for example, a simple failure to register a relevant interest as required, compared with a more serious refusal to resolve an actual conflict of interest of which the public official is aware. Sanctions should be enforceable, to the extent of ultimately affecting the appointment or career of the public official involved where appropriate.

b) Management measures – Positive management can provide effective complementary forms of redress for breaches of conflict-of-interest policy, and can be effective in dissuading those who would seek to benefit, directly or indirectly, from such breaches. Such measures could include retroactive cancellation of affected decisions and tainted contracts, and exclusion of the beneficiaries – whether corporations, individuals, or associations, etc. – from future processes. Such exclusion measures may operate for a given period of time, within given contract monetary limits, or for certain types of activities.

Develop monitoring mechanisms to detect breaches of policy and take into account any gain or benefit that resulted from the conflict

a) Controls – Ensure that management and internal controls as well as external oversight institutions – such as independent auditors or an ombudsman – work together to detect those who do not comply with required standards. Appropriate reporting for independent oversight institutions and the publication of regular reports on the implementation of integrity-management arrangements and on the progress of any investigation, can play an important role in encouraging compliance with policy and discouraging abuse of the integrity-management process.

b) Complaint-handling – Develop complaint mechanisms to deal with allegations of non-compliance, and devise effective measures to encourage their use. Provide clear rules and procedures for whistle-blowing, and take steps to ensure that those who report violations in compliance with stated rules are protected against reprisal, and that the complaint mechanisms themselves are not abused.

Co-ordinate prevention and enforcement measures and integrate them into a coherent institutional framework

a) Policy responsibility – Identify a central function, not necessarily an independent organisation or government agency, as being responsible for the development and maintenance of the conflict-of-interest policy and procedures; this function could also evaluate and provide guidance on agencies' management of conflict-of-interest policy and procedures, as well as selecting "champion" organisations and disseminating their best practices.

b) Synergies – Consider the combined use of complementary instruments to support related policy objectives; for example, disclosure systems that require regular declaration of financial and other interests can prevent potential conflicts of interest, help to detect illicit enrichment of public officials, and also help to deter corrupt practices.

c) Consistency of laws – Harmonise existing laws with the conflict-of-interest policy to remove conflicts and enable effective enforcement of the policy, including disclosure requirements and sanctions.

Initiate a new partnership with the business and non-profit sectors

Mechanisms for resolving conflict-of-interest situations must be kept up-to-date in the context of increasing co-operation between public organisations and the business and non-profit sectors. This is particularly crucial when appointing representatives to public bodies from other sectors to benefit from their particular experience, knowledge and involvement.

Create partnerships for integrity with the business and non-profit sectors by involving them in the elaboration and implementation of the conflict-of-interest policy for public officials

a) Stakeholder involvement – Engage representatives of the business and non-profit sectors in reviewing the policy in order to have their views on the problems of implementation, and possible applications of the policy.

b) Consultation – Ensure that proposed standards reflect actual public expectations by involving the business and non-profit sectors in the design of new integrity measures. Consultations could be used to identify or negotiate mutually acceptable solutions and encourage co-operation in the implementation process.

Anticipate potential conflict-of-interest situations when public organisations invite the involvement of persons representing businesses and the non-profit sector

a) Potential problems – Anticipate potential problems in order to maximise the benefit of involving representatives from other sectors in the work of public

bodies – such as boards and advisory bodies – by identifying situations where the involvement of these representatives could result in a conflict of interest.

b) Safeguards – Set up mechanisms that prevent confidential information, authority or influence gained through involvement in the activities of public bodies, from being used for personal gain or for the improper advantage of other businesses and non-profit organisations. Examples of potentially effective prevention mechanisms include the restriction of an individual's access to particular information, formally recording the fact that a specific individual has had access to particular confidential information, and requiring the identification of relevant private and business interests of appointees from the business and non-profit sectors.

Raise awareness of the conflict-of-interest policy when dealing with other sectors, and include safeguards against potential conflict-of-interest situations when co-operating with the business and non-profit sectors

a) Provide information – Make other organisations aware of the potential consequences of non-compliance (which can include the termination or retrospective cancellation of a contract, recording and publicising a proven breach in a register, or prosecution for criminal offences such as corruption). Assist partner organisations, for example through providing contractors with training in compliance with and enforcement of the stated requirements.

b) Review together high-risk areas – Potential conflict-of-interest areas should be identified, and appropriate preventive mechanisms developed, to protect both sides in a potential conflict situation. Ensure, for example, that partner organisations and the business sector accept that relevant private interests are to be disclosed transparently in the process of lobbying, and that breaches or attempted breaches of policy are to be brought to light so that they can be dealt with firmly and constructively. Similarly, ensure that partner organisations and the business sector are aware of the public organisation's requirements regarding the handling of privileged "inside" information that is not available in the public domain, ensure that "commercial-in-confidence" information is adequately protected by verifiable processes, and ensure that decision-making procedures at all stages can be audited for integrity and justified.

F. Recommendation of the OECD Council on Guidelines for Managing Conflict of Interest in the Public Service

The Council,

Having regard to Articles 1(c), 3(a) and 5(b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

Having regard to Rule 18(b) of the OECD Rules of Procedure;

Having regard to the Recommendation of the Council on Improving Ethical Conduct in the Public Service of 23 April 1998 [C(98)70/FINAL] that includes the Principles for Managing Ethics in the Public Service, and noting, in particular, that Principle 7 indicates that "there should be clear guidelines for interaction between the public and private sectors";

Having regard to the *Communiqué* of the 2000 Council meeting at Ministerial level that emphasised "building trust in public institutions is a keystone of good governance";

Recognising the desirability of establishing and maintaining a set of core principles, policy frameworks, institutional strategies, and practical management tools for managing conflict-of-interest matters in the public service;

On the proposal of the Public Management Committee:

a) RECOMMENDS that member countries, in establishing, amending or reviewing their conflict-of-interest policies in accordance with their own political, administrative and legal context, take due account of the *Guidelines for Managing Conflict of Interest in the Public Service* (hereafter the Guidelines)* which are set out in the Annex to this Recommendation and form an integral part thereof.

b) INVITES member countries, through their work in the Public Management Committee, to identify and disseminate good practices in the management of conflict of interest, as well as to assess areas in which further work could be appropriate.

c) INSTRUCTS the Public Management Committee to report to Council on progress made in implementing this Recommendation within three years of its adoption and regularly thereafter.

* The full text of the *Guidelines for Managing Conflict of Interest in the Public Service* can be seen in Part I.

PART II

Managing Conflict of Interest. A Comparative Overview of OECD Countries

Part II provides a comparative overview *of the experiences of OECD countries that highlights general trends, approaches and models across the OECD area, and also presents examples of innovative and recent solutions.*

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A. Introduction

Conflicts of interest have become a key issue in public debate throughout the OECD area. There is clearly an emerging potential for new forms of conflict between individual private interests and public duties particularly when an increasingly close relationship has developed between the public sector and the business and non-profit sectors. The OECD 2000 report – *Trust in Government* – on the implementation of the 1998 Recommendation on Improving Ethical Conduct in the Public Service, identified conflict of interest as a key emerging issue and called for follow-up. Principle No. 7 of the 1998 OECD Recommendation specifically requested that "there should be clear guidelines for interaction between the public and private sectors". In addition, the Communiqué of the 2000 OECD Council meeting at Ministerial level underlined that "building trust in public institutions is a keystone of good governance".

Addressing the growing public concern that has placed pressure on governments to ensure that mechanisms are in place for protecting the integrity of official decision making against erosion by a public official's private interest, the OECD launched a project to collect information on policies and practices in order to develop practical instruments for governments to modernise their conflict-of-interest policies. The resulting report consists of three main parts, namely:

- The *OECD Guidelines for Managing Conflict of Interest in the Public Service* that provide a unique policy instrument for decision-makers to review existing solutions and modernise mechanisms in line with good practices in OECD countries.
- The *comparative overview* of the experiences of member countries that highlights general trends, approaches and models across OECD countries, and also presents examples of innovative and recent solutions.
- Selected *country case studies* that provide more details on actual policy and practice, including the policy approaches countries used, the key elements of legal and institutional frameworks and how the policy is implemented in the particular national contexts in Australia, Canada, France, Germany, New Zealand, Poland, Portugal and the United States.

The report is based on the experiences of all 30 member countries collected in the OECD survey launched in mid-2001. High-level officials from twenty OECD countries formed the OECD Expert Group on Managing Conflicts

of Interest to provide direction for the project in general, and particularly for the development of the elements of the report. The Expert Group, under the chairmanship of Howard R. Wilson, Ethics Counsellor of the Government of Canada, reviewed the first findings of the survey, the possible elements and structure for a set of guidelines and also discussed case studies at its first meeting on 22-23 April 2002. The first draft of the Guidelines was commented on by the Expert Group in August 2002, and then the Draft Guidelines and the first draft of the comparative results of the OECD survey were examined by the Public Management Committee on 31 October 2002. Taking into consideration the written comments from countries, the final Draft Guidelines were approved at the second meeting of the Expert Group on 31 January 2003. The Public Management Committee unanimously approved the text of the Guidelines on 4 April 2003 and also decided to forward them to the OECD Council, who endorsed the Guidelines in the form of a Council Recommendation.

B. Scope of the OECD survey

The primary focus of the OECD survey was on public officials, including public servants, civil servants and holders of public office (elected or appointed) working at the national level of government administration. Responses clearly indicated that OECD countries pay particular attention to:

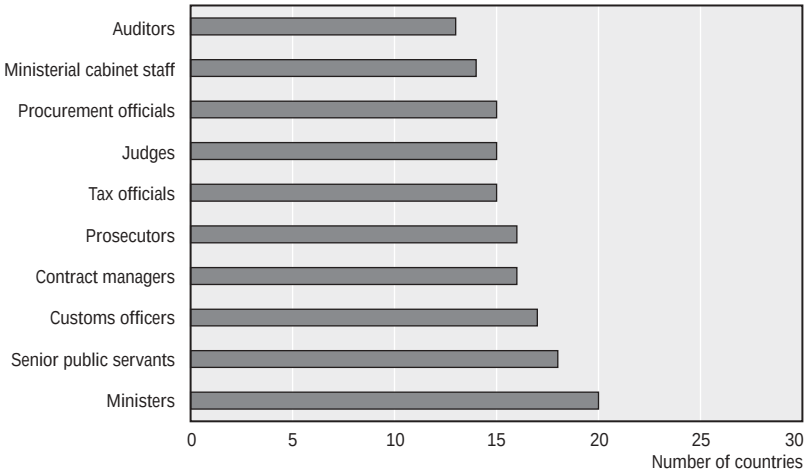
- policy-makers and public office holders working in the most senior positions;
- public officials working in key functions of the state, such as law enforcement; and
- decision-makers in sensitive areas at the interface of the public and private sector.

Although reasons for creating specific policies for certain categories vary among countries, the trend is to prevent possible conflicts for officials in high positions and in sensitive areas at the interface between the public and private sectors. In Canada, for instance, the focus is on the Executive that consists of members of the Ministry, including the Prime Minister, Ministers, Ministers of State and Secretaries of State as well as their staff; Parliamentary Secretaries, Cabinet appointees such as deputy ministers of government departments and the heads of agencies, Crown corporations, boards, commissions and tribunals. While in the United States there are general policies applicable to all, additional restrictions are focused upon those at a senior rank regardless of the nature of their duties.

Measures used for these groups to take into consideration the special position of the categories of public officials. In general, the higher the position, the stricter the policy and the more transparency is requested. For example, these officials are regularly called to provide information on their financial

Figure 1. **Developing specific conflict-of-interest policy for particular categories of officials**

Which categories of public officials are covered by specific conflic-of interest policy?



Source: OECD.

assets, and the declarations of financial interests and personal assets provided by the most senior public office holders are often made public. The following catalogue of examples lists a variety of solutions applied in senior positions or especially vulnerable areas.

1. Ministers and parliamentary secretaries of state

- *Belgium* – Listing of mandates, functions and professions requested by executive decree.
- *Canada* – Confidential disclosure of *all* assets, investments, liabilities, outside activities, gifts and hospitality received. The *Conflict of Interest and Post-Employment Code for Public Office Holders* also requires that certain assets defined by the Code as *declarable assets*, certain permissible *outside activities*, and *gifts, hospitality and benefits* must be declared publicly in the Public Registry. The Public Registry also contains a Summary Statement that indicates the methods of compliance used by the public office holder.
- *Germany* – Notification to the Federal Government of gifts received in connection with the official's position.
- *New Zealand* – All Ministers and Parliamentary Under-Secretaries are required by the *Cabinet Manual* to lodge an annual declaration with the Registrar of Ministers' Interests. Declarations are tabled by the Prime Minister in Parliament each year and also open to public scrutiny.
- *United Kingdom* – Ministers are advised to provide their Permanent Secretary with a full list in writing of all interests (including those of a

spouse or partner, of children, etc.) which might be thought to give rise to a conflict. The *Ministerial Code*[1] lists forms of private interests, sets procedures for resolution of conflicts in general and also addresses specific issues, such as Ministers' constituency and party interests.

2. Chief of ministerial cabinet, advisors to minister, staff in ministerial cabinet
   - *Belgium* – Listing of mandates, functions and professions requested for chief of cabinet by executive decree.
   - *Canada* – Confidential disclosure of all assets, investments, liabilities, outside activities, gifts and hospitality received, followed by a Public Declaration of assets, activities, gifts and hospitality which are permitted under the *Conflict of Interest and Post-Employment Code for Public Office Holders*.
   - *Denmark* – Introduced further transparency measures for employing political advisors as requested by the *White Paper 1354 on the Relations between Ministers and Civil Servants* issued in May 1998.
   - *New Zealand* – Immediate notification of the minister in case of possible conflict of interest requested by the *Cabinet Manual.*
   - *United Kingdom* – Setting out principal terms and conditions of employment, specifically in relation to outside appointments and confidentiality in line with the *Model Contract for Special Advisors*, issued in September 2001.[2]
3. Senior public servants
   - *Australia* – Written statements on own and immediate family interests.
   - *Finland* – The most senior civil servants are asked to declare their private interests according to provisions of the *Civil Servant's Act* that came into force in September 1997.
   - *Poland* – Asset disclosure, exclusion from proceedings.
4. Officials in charge of contract management, procurement officials
   - *New Zealand* – The Audit Office developed specific *Good Practice for Purchasing by Government Departments*[3] guidelines that sets out the standards for identification and management of conflict of interest. Cases are examined with the management; a Parliamentary Select Committee may also review cases with departments.
   - *Poland* – Asset disclosure, exclusion from proceedings.
5. Judges and prosecutors
   - *Canada* – Self-regulating conduct rules for federal judges established through the Canadian Judicial Council in 1998.[4]
   - *Poland* – Asset disclosure, exclusion from proceedings.

In France and Germany, specific policy regarding financial transparency is created for the policy makers in high-level positions.

Box 1. **Exemplary restrictions for the most senior positions in Germany**

While aiming for exemplary transparency for the most senior positions, Germany's policy also requires federal Ministers and Parliamentary Secretaries of State to restrict their non-ministerial activities. The following activities are forbidden by the law for federal Ministers and Parliamentary Secretaries of State while they are in office:

- Occupying another salaried office.
- Practising another profession or commercial occupation.
- Acting as a paid arbitrator or undertaking a consultant activity outside the courts.
- Holding an honorary public position, without government permission.

In general the law also prohibits sitting on boards or supervisory boards of companies with profit-making aims, however the Federal Parliament *Bundestag* (for federal Ministers) and/or the Federal Government (for Parliamentary Secretaries of State) can grant specific permission as an exception in individual cases.

The rigorous application of the *exclusiveness principle,* widely used in countries with long administrative law traditions, lays down particularly strict disqualification for senior public officials. In Portugal, the group of senior public officials include the following categories:

- Public office holders and senior public office holders in supreme authorities, such as the Head of State and ministers.
- Political post holders, such as parliamentarians.
- Chairmen, vice-chairmen, members of the management of public institutions.
- Director-general and deputy directors-generals in the public administration.

These categories of public officials are *disqualified* from:

- Any other professional activities, whether remunerated or not.
- Involvement in governing bodies of any profit-making corporate bodies or remunerated participation in other corporate bodies.

Specific measures applied at the *political-administrative interface* have been developed in some countries. In Germany, for example, the same standards – determined by the relevant code of conduct – apply to civil servants and

employees working at the political-administrative interface. However, as a complementary specific measure, they can be put into temporary retirement at any time without declaring the reasons.

Countries are also aware of the inherent conflict between management functions and employee representation. In Finland, for instance, civil servants representing the state as an employer may not hold any post in an association representing state employees in order to avoid potential conflicts with their official duties.

Developing specific policies for senior categories of public officials and exposed areas is a significant trend both in countries with devolved public management and more traditional administrative systems. It is generally recognised that the core principles and standards of the conflict-of-interest policy should be consistently applicable throughout the whole public service in order to ensure compatibility and complementarity of effects. However, a sound policy also assists defined groups with specific standards related to the particular working contexts and expectations.

C. Formal sources of conflict-of-interest policy

The fundamental provisions of a conflict-of-interest policy are so important that they are usually included in a country's legal framework. With the exception of two European countries, conflict of interest is regulated through primary legislation. In general, core principles and basic rules can be found in laws on public or civil service and public administration. In a few countries, even the Constitution states principles, particularly those which affect citizens' rights, for instance, the principle of exclusiveness, which obliges public officials to exclusively serve the public interest. They also establish restrictions on political rights and the right to strike, and define incompatibilities for public office holders.

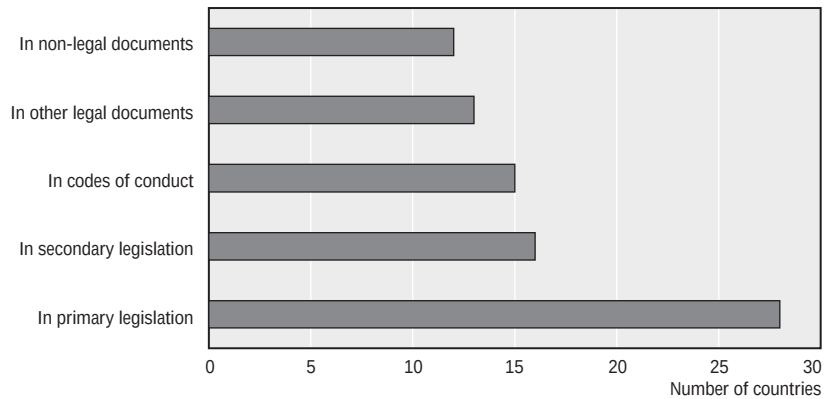
More and more countries employ specific laws to cover sensitive areas for particular groups (*e.g.* company law for board members). An emerging trend shows that a growing number of OECD countries enact conflict-of-interest laws or codes of conduct to set standards for identifying, preventing and managing potentially conflicting situations. Recently developed codes of conduct in Europe not only set general principles concerning conflict of interest but also give detailed directions on what to do in case of doubt (*e.g.* the Czech *Code of Ethics for Public Servants* approved by the Government in March 2001 and the Italian *Code of Conduct for Government Employees* that came into force in April 2001). The following figure indicates the formal sources that determine conflict-of-interest policy in OECD countries.

Ireland, New Zealand, Poland and the United States make use of all the instruments mentioned in Figure 2. above while Austria, Belgium, Finland,

Luxembourg and Mexico exclusively focus on legal instruments, and more specifically on primary legislation. A main reason behind this regulatory approach is exemplified by Austria, where the measures and instruments within the general law are considered to be so effective that they reduce the need for individual provisions.

Figure 2. **Documents stating the principles and rules of conflict-of-interest policy**

In which documents are the principles and rules for avoiding conflicts of interest stated?



Source: OECD.

The diversity and range of formal sources of the policy also indicates countries adherence to rule-based or principle-based approaches. An important consideration in OECD countries is how to combine rigid base-line standard-setting with more diverse, flexible, and practical instruments, which can be tailored to the special circumstances in which certain groups operate. Additionally, concise and practical instruments using plain language can more effectively communicate policy standards and expectations to both public officials and the public at large. The following list indicates the variety of formal sources with examples from OECD countries:

1. Primary legislation, including acts, codes and statutes:
   - *Civil Service Act* of 1998 and the *Limitation on Conducting Business Activity by Persons Performing Public Functions Act* of 1997 in Poland.
   - *Law on the Declaration of Interest and against Corruption* of 1990 in Turkey.
   - *Civil Service Code* and *Criminal Code* in Austria.
   - *Government Employees Act* of 1996 and the *Public Administration Act* of 1993 in Iceland.
   - *Bribery, Graft, and Conflicts of Interest*, Ch. 11 of Title 18, United States Code.
   - *Code of Civil Servants*, Law 2683/1999 in Greece.

2. Secondary legislation, including directives, rules and decrees:
   - *Directive concerning the Prevention of Corruption in the Federal Administration* issued by the Federal Government on 17 June 1998 in Germany.
   - *Principles of Ethical Conduct for Government Officers and Employees* issued by the Executive Order 12731 of 17 October 1990 in the United States.[5]
   - *Rules of the National Personnel Authority* (*e.g.* on acceptance of a position in a profit-making enterprise, on political activities) in Japan.
3. Other legal documents, such as orders, circulars and collective agreements:
   - *Standing Orders* of the House of Commons in Canada.
   - *Special Agreements for the Public Sector* in Sweden.
   - *Circulars* issued by the Department of Finance in Ireland[6] or the Australian Public Service Commission.[7]
   - *Annual Reports* of the Ombudsman in Denmark.
4. Codes of Conduct:
   - *Cabinet Handbook*[8] approved by the Government of Ireland in 1998.
   - *Conflict of Interest and Post-Employment Code for Public Office Holders* issued in 1994 in Canada.
   - The *Civil Service Management Code* (1995) in the United Kingdom.
   - *Standards of Ethical Conduct for Employees of the Executive Branch* in the United States.
5. Non-legal documents, such as guidelines, codes and advice:
   - *Board Appointment and Induction Guidelines* published by the State Services Commission in August 1999 in New Zealand.
   - The Ethics Counsellor's *Advice* to members of the Ministry and ministerial staff in Canada concerning dealings with quasi-judicial tribunals, state owned corporations and Party leadership campaigns.
   - *Informal advisory letters and memoranda, and formal opinions* provided by the United States Office of Government Ethics on the interpretation and compliance with conflict of interest, post-employment, standards of conduct, and financial disclosure requirements in the Executive Branch.
   - *Memoranda* issued by the Office of Legal Counsel of the Department of Justice in the United States, for example the memorandum concerning the application of conflict-of-interest rules to appointees who have not begun service[9] dated 8 May 2002.
   - *Guidelines* on the relations between ministers and civil servants issued by the White Paper 1354 in Denmark in May 1998.

Box 2. **Conflict-of-interest regulations in Italy**

In Italy a series of legal instruments have been designed to prevent public officials from advancing their personal, private or particular interests to the detriment of the general good.

The *principle of exclusive service* – "public employees are at the exclusive service of the Nation" – has been endorsed explicitly by the Italian Constitution. It prohibits public employees from providing services for their own personal interest or for that of the political party which they belong to.[1] Moreover, specific provisions of the Constitution[2] deal directly with potential conflict-of-interest situations, when they:

- Stipulate that public employees, if they are members of Parliament, may be promoted only on the ground of seniority.
- Provide legal limits on the right to belong to political parties for magistrates, career army officers on active service, public officials and police officers, diplomatic and consular representatives abroad.

For the *whole public sector,* more details on the application of the principle of *exclusivity of public employment* has been legislated since 1957, when the law[3] introduced precise restrictions for incompatibilities, plurality of jobs and appointments:

"The employee may not engage in industry, commerce or any other profession, or be employed by private individuals, or accept posts in profit-making companies, except in case of posts in companies or organisations to which only the State can make appointments and, in this case, only after the competent Minister has given the authorization."

For *magistrates,* laws have regulated incompatibilities for over six decades by forbidding magistrates to "undertake public or private employment or office, or engage in industry or commerce, or exercise any other profession".[4] Similar rules are laid down for administrative magistrates,[5] and for Judges of the Constitutional Court.[6]

Preventing potential conflict-of-interest situations is a long tradition in criminal and civil procedural laws. These regulations oblige judges[7] and other public office holders[8] to abstain from participating in decisions in which they themselves or their near relatives have an interest, or with regard to which they believe they would not be able to maintain absolute disinterestedness in the procedure. In addition, the criminal code also provides for specific offences when administrative office is used to gain unjust material advantage for public office holders or persons associated with them.[9]

Box 2. **Conflict-of-interest regulations in Italy** *(cont.)*

For *elected representatives* – members of Parliament and regional councillors – the Constitution[10] determines the basic cases of ineligibility and incompatibility. Legislation has barred Parliamentarians from holding posts in government-appointed public bodies for half a century.[11] Further specific cases of ineligibility are listed in the 1957 electoral law[12] for members of the Chamber of Deputies. The following may not be elected as deputy:

- Persons who on their own account or as legal representatives of private companies or enterprises are bound to the State by work or service contracts, or by administrative concessions or authorisations of considerable financial importance which involve the fulfilment of specific obligations, compliance with general or particular regulations intended to protect the public interest, to which the concession or authorisation is subject.
- Representatives, administrators and directors of companies and enterprises set up for the benefit of private individuals which are subsidised by the State with on-going grants or with the guarantee of allocations or interests, when such subsidies are not granted by virtue of a general national law.
- Legal and administrative consultants who permanently provide their services to such persons, companies and individuals as described under points 1 and 2, who are bound to the State in the ways described above. However, such ineligibility does not apply to the managers of co-operatives and consortia of co-operatives who are duly registered with the Prefecture.

Similarly, specific prohibitions were introduced for elected representatives at sub-national level that list ineligibility for regional, provincial or municipal councillor, and also provide ground for removal from office if a cause of ineligibility or incompatibility has arisen.[13]

The most recent effort to prevent conflict of interest in public life is a bill[14] concerning holders of government office that is before the Parliament. This proposed legislation identifies a wide series of specific incompatibilities related to both other public posts and private employment, such as:

- Management positions, functions and activities in profit-making companies.
- Professional and employment activities connected to the function performed.
- Management positions, functions and activities in professional associations and/or corporate companies.
- Private employment relationships.

Box 2. **Conflict-of-interest regulations in Italy** *(cont.)*

In the cases listed in the provisions, government office holders are obliged to abstain from any decision, including collective decisions. Additionally, office holders must not hold back information which would further their own interests or those of their close relatives (spouses and relations of the first or second degree), or the interests of the companies they control.

In order to ensure the effective implementation of this future legislation, it is proposed that independent authorities should be in charge of resolving actual conflict-of-interest situations. The first one is the Antitrust Authority that is required to intervene when:

- A government office holder, by performing an action or omitting to perform an action he should have performed, has procured an advantage to his own financial position or that of the companies he/she controls (determined as "intervention from above").
- A company owned by the government office holder, or companies controlled by him/her, behave in such a way as to derive advantages from decisions taken by the government office holder in a situation where there is a conflict of interests (determined as "intervention from below").

The other independent "watchdog" is the Communication Authority.[15] Its task is to monitor whether companies in the communication sector[16] are providing privileged support to the government office holder. This Authority is empowered to apply all the administrative sanctions already provided for in the laws[17]governing the communications sector, to the point of revoking the operator's state radio or television broadcasting licence.

As the most recent initiative, a High Commissioner for preventing and combating corruption and other forms of illicit conduct has recently been appointed[18] within the public administration to study, monitor and investigate facts. This mechanism could also provide valuable support in the management of conflict-of-interest situations in the public sector.

1. Article 98 of the Italian *Constitution* of 27 December 1947.
2. Namely Para. (2) of Article 98 of the *Constitution*.
3. Namely, Art. 60 of the *Single Text of provisions concerning the Status of Civilian Employees of the State* that was approved by Presidential Decree No. 3 of 10 January 1957.
4. Article 16 of Royal Decree No. 12 of 1941.
5. Article 28 of Law No. 186 of 27 April 1982.
6. Article 8 of Law No. 87, 1953.
7. Article 51 of *Code of Civil Procedure.*
8. Article 279, single text, criminal code, 1934; Art. 290 single text, *Code of Civil Procedure*, 1915; (see now legislative decree No. 267 of 18 August 2000, entitled *Single Text of the Laws Regulating Local Authorities*).
9. Article 323 of the *Criminal Code.*
10. Namely Article 65 for members of Parliament and Article 122 for regional councillors. These provisions were confirmed by the constitutional reform No. 3 of 2001.

Box 2. **Conflict-of-interest regulations in Italy** *(cont.)*

11. According to Article 1 of Law No. 60 of 13 February 1953 (*Law on Parliamentary Incompatibility*), "*member*s of Parliament may not occupy posts or functions of any kind in public or private organisations, to which people are appointed or designated by the Government or organs of the State Administration".
12. Article 10 of the *Single Text of the Laws Regulating Election to the Chamber of Deputies*, approved by Presidential Decree No. 361 of 30 March 1957.
13. Law No. 154 of 23 April 1981 (*Law on Ineligibility and Incompatibility for Regional, Provincial, Municipal and District Councillors and on Incompatibility for National Health Service Employees*).
14. The AC 1707, *Bill on resolution of conflict of interests* was approved by the Chamber of Deputies on 22 July 2003 and transmitted to the Senate for final approval expected by the Autumn of 2003.
15. *Autorità per le garanzie nelle communicazioni*.
16. This includes "sound and television communications, including new forms of multimedia technology and publishing (including electronic publishing), performed by any technical means" as prescribed by Article 2, Para. 1 of Law No. 249/1997.
17. Namely, Law No. 223/1990, Law No. 249/1997 and Law No. 28/2000.
18. Subsequent to Article 1 of Law No. 3 of 16 January 2003.

It is also important to analyse the changes in the development of instruments in order to see the trends in a historical perspective and recognise how countries shift their emphasis in approach and take advantage of complementary instruments. In the United States, for example, the approach in managing conflict of interest has moved from reactive criminal prosecution, to more proactive training, education and counselling programmes, although retaining the rule-based approach focusing on the responsibility of employees. In Portugal, where the policy originally focused on political accountability of political post holders, it has been replaced by a number of explicit prohibitions enacted by the law. Although these dynamics are primarily a response to the political and societal changes in a given country, influence from other countries, international institutions as well as the business sector can also be considerable. For example, the increasing popularity of simple language codes of conduct to set standards for conflict-of-interest policies demonstrates this international trend.

Because of their concise focus, flexible nature and straightforward language, codes of conduct can be used to both set standards for a whole public sector-wide conflict-of-interest policy and address specific relationships as well as emerging issues in areas such as the interface between the public and private sectors. One emerging field is lobbying, where, for example, in line with the Canadian principle-based approach, the *Lobbyists Code of Conduct* provides a set of core principles and standards. The Code requests lobbyists to disclose the identity of their clients to public office holders and not to place public office holders in a conflict of interest by proposing or undertaking any action that would constitute improper influence on a public office holder.

Box 3. **Implementing policy in decentralised systems**

A rising concern in OECD countries is how to provide and institutionalise adequate frameworks for integrity in systems where management responsibility has been devolved to a wide variety of agencies, authorities and other government bodies. As in other decentralised systems, in Australia and New Zealand, the responsibility for ensuring that conflict-of-interest situations are sufficiently identified and managed rests with individual agency heads.

In Australia, the Public Service Commission (PSC) provides guidance to agencies on the application of the Australian Public Service (APS) Values and Code of Conduct. In the Annual *State of the Service Report*, the Public Service Commissioner also reports on agencies' effectiveness in these areas. The following types of documents* provide information on the conflict-of-interest policy in the Commonwealth:

- In primary legislation, the *Public Service Act 1999*, particularly, Section 13 of the Act that contains the APS Values and Code of Conduct.
- In secondary legislation, the *Public Service Commissioner's Directions* on the application of the APS Values.
- In other non-law instruments, such as specific *Guidelines on Official Conduct of Commonwealth Public Servants* updated by the Public Service Commission in 1995, and the *Ethical Standards and Values in the APS* produced by the Management Advisory Board in 1996. There are further general publications containing advice and guidance on how the policy might be applied in the workplace, such as the *Values in the Australian Public Service* published by the Public Service and Merit Protection Commission in 2000.

Influencing conflict-of-interest policy in a wide variety of autonomous public bodies in the wider public sector is a particular challenge in New Zealand where the whole state sector includes about 3 000 organisations, of which less than 50 organisations fall within the legal Crown, that consists of the functions of the central government. The rest are mostly governed by a board that is either appointed by a Minister or elected. These organisations are responsible for designing and implementing their own specific conflict-of-interest policies for their employees. Although the central government has no formal mechanism of addressing conflict of interest for this category, Ministers are able to express their expectations through other means, such as Ministerial letters of expectation directed to the managing board, and an emphasis on ethics in accountability documentation.

* These documents can be downloaded from the website of the Australian Public Service Commission at *www.apsc.gov.au*

D. Managing conflict of interest: Approach and definition

Defining and managing conflict of interest is primarily influenced by the political, administrative and legal context of a country. The two major approaches found in the OECD reflect these country environments and define conflict of interest either descriptively or prescriptively.

- The *descriptive approach* defines conflict-of-interest situations in general terms and provides public officials with the general features of the phenomenon. General principles together with exemplified general cases provide guidance for public officials in preventing and avoiding conflict-of-interest situations. In this approach general principles play the primary role by stating what is expected of public officials in general, while specific rules and procedures have a complementary role.
- The *prescriptive approach* defines a range of specific situations that are considered incompatible with public office or in conflict with the public interest and official duties. This rules-based approach provides public officials with detailed enforceable standards, generally in legal regulations. However, these standards are ultimately based on fundamental public service principles that can also embody aspirational goals.

Irrespective of which approach is taken by a country, the definition of "conflict of interest" is the centrepiece of the policy. Providing an adequate definition for conflict of interest is essential to a proper understanding of the problem. Adequately defining the notion of conflict of interest also supports the development of the regulatory framework and guiding mechanisms to properly identify and resolve actual and potential conflicts, which can take many and varied forms. In general, "conflict of interest" is defined as a conflict between the public duty and private interests of a public official, which arises from the public official's private-capacity interests, where those interests have the potential to improperly influence the performance of official duties and responsibilities. Consequently, the overall aims of the conflict-of-interest policy are:

- Ensure the impartial and disinterested fulfilment of public duties and official responsibilities, uninfluenced by considerations of private benefit, in order to promote integrity among officials.
- Foster public trust in public institutions.

Although the great majority of OECD countries enact conflict-of-interest policy in laws and regulations, only very few countries have developed a general definition in the law for the term of "*conflict of interest*". In countries with no general definition in law adaptable across the whole public service (such as Australia, Germany or Norway) the existing provisions apply to various specified categories of public officials. This is also the case in

Box 4. **Tailored approach to define conflict of interest: New Zealand**

In New Zealand, the definition of conflicts of interest is tailored to targeted groups, such as public servants, ministers or board members of crown companies. Nevertheless, these definitions contain common features. For example, they all cover actual and perceived as well as direct and indirect conflicts. In addition to the general definitions developed for the targeted groups that are outlined in this box, supplementing documents also list possible types of conflict-of-interest situations, together with concrete practical examples.

For **public servants**: "Conflicts of interest are defined as, ... any financial or other interest or undertaking that could directly or indirectly compromise the performance of their duties, or the standing of their department in its relationships with the public, clients, or Ministers. This would include any situation where actions taken in an official capacity could be seen to influence or be influenced by an individual's private interests (*e.g.* company directorships, shareholdings, offers of outside employment). ... A potential area of conflict exists for public servants who may have to deal directly with members of Parliament who have approached the department in a private capacity." (*Code of Conduct*)

For **ministers**: "Conflicts of interest can arise because of the influence and power they wield – both in the individual performance of their portfolio responsibilities and as members of Cabinet. Ministers must conduct themselves at all times in the knowledge that their role is a public one; appearances and propriety can be as important as actual conflict of interest in establishing what is acceptable behaviour. A conflict of interest may be pecuniary (that is, arising from the Minister's direct financial interests) or non-pecuniary (concerning, for example, a member of the Minister's family) that may be either direct or indirect." (*Cabinet Manual*)

For **board members of Crown companies**, a conflict of interest is defined as a situation in which a board member is "party to, or will or may derive a material financial benefit from" a transaction involving his or her company (*The Companies Act 1993*, Part VIII, Sections 138 and 139).

For **board members**, conflicts are defined as arising ... "where a prospective or existing board member has an interest which conflicts (or might conflict, or might be perceived to conflict) with the interests of the Crown body itself. The key question to ask when considering whether an interest might create a conflict is: does the interest create an incentive for the appointee to act in a way which may not be in the best interests of the Crown body? If the answer is 'yes', a conflict of interest exists. The existence of the incentive is sufficient to create a conflict. Whether or not the appointee would actually act on the incentive is irrelevant". (*Board Appointment and Induction Guidelines*, State Services Commission, August 1999).

New Zealand where the definition of conflict of interest is "tailored" to the type of position to which it is to be applied, as shown in the following box.

Countries which have developed their conflict-of-interest policy in detailed laws and regulations typically define and prohibit a variety of circumstances that are considered to create conflict of interest. Although conflicts generally arise from financial and economic interests and close personal relationships, other personal interests, undertakings and relationships may also be recognised as having potential to compromise, directly or indirectly, the impartial performance of duties of public office holders. In the rule-based approach, the precisely identified, prescribed and prohibited forms of conduct, relationships and situations provide public officials with a clear frame of expected standards to which they can be held accountable. On the other hand, public officials can be relieved from the uncertainty of misinterpretation derived from a general definition.

In Germany, for example, while a general definition of conflict of interest does not exist, the *Act on Federal Civil Servants* and the corresponding *Länder* statutes establish required modes of conduct for *civil servants* on how to serve exclusively the public interest:

- The obligation of full dedication to the profession as a civil servant, and a corresponding duty to obtain permission for involvement in outside activities.
- An obligation to carry out official duties impartially.
- The necessity of restraint in political activities.
- An obligation of selflessness in carrying out of duties of public office.
- The duty to obtain permission for the acceptance of gifts connected with public office.

For *employees* working in the public service, the obligation to avoid conflict-of-interest situations are usually laid down in individual employment contracts and collective agreements, in addition to the general labour or public service employment legislation.

The Executive Branch of the United States government administration does not use a single-term definition for conflict of interest. Instead, statutes and regulations identify and prohibit a variety of circumstances that are considered to create a conflict-of-interest situation for a public official. These situations include:

- Private, non-official representations by federal officers of individuals or entities, with or without pay, to any federal agency or court, or sharing in a claim against the federal government as compensation for assistance in the claim.

- Acting in an official capacity in a government matter in which the executive branch official (or spouse, minor child, or general partner, or organisation with whom official serves as an officer, director, trustee, general partner or employee, or with whom the official has an agreement or arrangement for future employment) has a financial interest.
- Acceptance from a non-government source of any additional salary or supplementation of salary by an executive branch official as compensation for official duties.
- Certain representations of private parties to the government by former government officials.
- The acceptance of certain witness fees.
- The acceptance of bribes.

The absence of general definition can also be found in countries with a principle-based approach. In this case raising the awareness of employees regarding identifying and disclosing conflicting private interests is a critical precondition to successfully prevent potential conflict-of-interest situations and resolve them when they actually arise. For instance, there is no single legal definition of conflict of interest used across the whole Australian Public Service. However codes and guidelines together with education programmes raise the awareness of public servants about possible forms of conflicting financial and other personal interests.

While the principle-based approach primarily aims at enabling public officials to make ethical decisions in their real-life working situations, this can consistently be complemented by policy instruments that illustrate occurrences of concrete conflict-of-interest situations and even legal provisions that set base-line standards for strict compliance in critical areas. For example, the Canadian principle-based approach promotes integrity in a proactive way by principally using codes of conduct and other guiding instruments to provide key principles and define possible sources of conflicts. Additionally, laws enact minimum enforceable standards in specific situations:

- The *Criminal Code* defines certain types of conflicts of interest as criminal offences, such as influence peddling, or bribery.
- The *Parliament of Canada Act* prohibits senators and members of Parliament from receiving any compensation in relation to matters brought before the Senate or the House of Commons.

Clear and realistic description of what constitutes conflict of interest is indispensable for establishing a sound policy. Comprehensively defining conflict of interest may well include a general description of situations and activities that can lead to actual, apparent, and potential conflicts, and also reflect the expectations of the public. Definitions can include those

Box 5. **Definition of conflict of interest in Europe**

Portugal is one of the few countries that have articulated a brief and explanatory definition of conflict of interest in the law: conflict of interest is an opposition stemming from the discharge of duties where public and personal interests converge, involving financial or patrimonial interests of a direct or indirect nature.

Similarly, countries in transition in Central Europe put a particular emphasis on providing public officials with a general legal definition applicable across the whole public service that addresses not only actual but also perceived conflicts. For example, the *Code of Administrative Procedure* in Poland covers both forms and also makes a clear distinction between actual and perceived conflicts of interest: a situation of genuine conflict of interest occurs when an administrative employee has a family or personal relationship with the applicant, or the results of the case could have an effect on the employee's rights and duties. Any doubt concerning the objectivity of the employee is considered as a perceived conflict of interest.

Further details on definitions in a variety of legal documents can be seen in Annex 1 of the chapter on Managing Conflicts of Interest in Transition Economies: The Polish Experience.

prohibited situations and activities that are considered *ipso facto* unacceptable because they are considered as adversely influencing integrity and public confidence in government organisations. In line with a "tailored" approach, more specific standards may need to be elaborated for those groups that are working in particularly exposed or at-risk functions, including the public sector/private sector interface and in elected bodies under close public scrutiny. Finally, conflict of interest is not a constant phenomenon, countries need to review and adjust the description of conflict-of-interest situations to take into consideration the changing administrative-political and societal context.

Ensuring coherence of policy standards for identifying and managing conflict of interest across the whole public service is a key concern when countries adjust their mechanism to changing public sector environments. As the following case shows, the outcomes of a recent inquiry in Sweden resulted in an adjustment in the legal provisions to re-set the base-line standards that are expected across the whole public sector, while it also maintained the flexible management frameworks that provide managers with room to tailor more specific expectations to particular working environments.

Box 6. **The definitional approach of the OECD Guidelines**

Recognising that countries have different historical, legal and public service traditions, which may impact on the way conflict-of-interest situations have been understood, the OECD Guidelines developed a definition of "conflict of interests" which is intended to be simple and practical, to assist effective identification and management of conflict situations:

A "conflict of interest" involves a conflict between the public duty and private interests of a public official, in which the public official's private-capacity interests could improperly influence the performance of their official duties and responsibilities.

On this basis, a "conflict of interest" involves a *situation* or *relationship* which can be current, or may have occurred in the past. Defined in this way, "conflict of interest" has the same meaning as **actual conflict of interest**. For example, a senior official who personally owns shares in XYZ corporation, while that company is in the process of competing for a contract to supply the official's agency with services, can be said to have either a conflict of interest, or an 'actual' conflict of interest if the official concerned is involved in any aspect of decision-making in relation to the contract.

By contrast, an **apparent conflict of interest** exists where it *appears* that an official's private interests could improperly influence the performance of their duties *but this is not in fact the case*. For example, the senior official who owns shares in XYZ corporation may have made formal internal administrative arrangements, which are not known to the public at large but which are satisfactory to the official's organisation, to stand aside from all decision-making in relation to the contract for which XYZ corporation is competing, in order to resolve the conflict.

A **potential conflict of interest** occurs where a public official holds a private interest which would constitute a conflict of interest if the relevant circumstances were to change in the future. For example, where a member of an official's immediate family is employed by the same organisation, there is a realistic *potential* conflict if the official could be required to supervise the work of his family-member. A potential conflict of interest exists for an official who owns a large number of shares in a forestry company which may, in the future, decide to compete for a timber-production contract with the official's department, where he or she is in charge of procurement. Similarly, a potential conflict of interest exists for an official who holds investments in a chemicals company which could, in principle, be prosecuted (for example, for an environmental pollution offence) by the regulatory authority in which the official currently holds a senior position in the prosecution service. The Guidelines recognise that it is a question of judgement as to what situations hold a realistic potential for a conflict of interest to arise.

Box 6. **The definitional approach of the OECD Guidelines** *(cont.)*

It is important to note that this definitional approach is necessary to be consistent with the policy position which recognises that conflicts of interest will arise, and must be managed and resolved appropriately, in a situation analogous to that of placing the King in check in Chess: being in check must be resolved, but is not *of itself* fatal unless the situation cannot be resolved in accordance with the rules.

Where an official has failed to declare a relevant interest situation, or has allowed a conflict-of-interest situation to continue unresolved, or has in fact allowed a private-capacity interest to improperly influence the performance of their duties, the definition provided by the Guidelines encourages clarification of what is actually at stake. For example, where the official concerned has failed to declare a relevant interest, the draft Guidelines suggest that such a situation would be better regarded as an instance of misconduct, and not as a simple "conflict of interest". By contrast, where an official has acted improperly or corruptly so as to receive a bribe or to give an illegitimate advantage to a family member (etc.), it would be preferable to treat the matter as "abuse of office", or as corruption (depending on the specific circumstances), rather than as a conflict-of-interest situation, even though a conflict of interest was fundamental to the corrupt conduct.

In this definition, "private interests" are not limited to financial or pecuniary interests, or those of direct personal benefit to the official. Personal affiliations or relationships, debts and other obligations, religious or ethnic associations, professional and party-political alignments, and family interests, may come within the scope of the definition if those interests could reasonably be considered as likely to influence improperly the official's performance of their duties.

Box 7. **Policy review and revision: The case of extra-occupational activities in Sweden**

In response to the radical changes that have taken place in the last three decades in the Swedish public administration, a recent inquiry* reviewed regulations on extra-occupational activities and resulted in stricter laws for certain forms of extra-occupational activities. Although the key approach of the conflict-of-interest policy remained – namely, enabling individual employees to handle their conflict-of-interest situations – the new regulations expanded the same standards for all public sector employees concerning extra-occupational activities.

The inquiry identified the following factors that substantially influenced the socio-administrative conditions in Sweden:

- New steering and management arrangements in the administration.
- Growing "grey areas" between the public administration and the private sector.
- Computerisation of public administration functions.
- Increased scrutiny by the media.
- Increased internationalisation.

Consequently, the Swedish Government considered it necessary to provide clear and unambiguous rules regarding extra-occupational activities of all officials. The key policy intention behind the change was, in line with the overall international trend, maintaining public confidence in government institutions. Accordingly, it requested that the inquiry pay particular attention to those extra-occupational activities of officials that can damage public confidence. The central question of the inquiry was whether it was possible to keep the confidence of the public while practising certain specified activities or assignments. Three major types of extra-occupational activities were reviewed in the inquiry specifically:

- Activities which adversely affected public confidence in an organisation.
- Activities which adversely affected an official's performance.
- Activities which were basically in competition with government.

The last category includes activities such as taking part in or having a business that competes with the functions of the employee's organisation. Such competition can result, for example, in the risk of divided loyalty when senior post-holders have a board position in a business, or when a public employee has an engagement in an activity which coincides with one of the public employer's activities, or is conducted under its supervision.

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Box 7. **Policy review and revision: The case of extra-occupational activities in Sweden** *(cont.)*

Two different legal frameworks

The extra-occupational activities of *state employees* were traditionally regulated in two different ways, namely through:

- The *Public Employment Statute*, which prohibits extra-occupational activities adversely affecting performance of duties or public confidence.
- Collective agreements between the parties of the state labour market that regulate extra-occupational activities adversely affecting work performance, and activities of a competitive nature.

For *employees of municipalities and county councils*, on the other hand, collective agreements regulated both extra-occupational activities adversely affecting confidence, as well as those adversely affecting working practices or which are competitive in nature.

In the inquiry the following two main concerns emerged regarding the implementation of past regulations:

- The contrast between increased opportunities for state employees to take up extra-occupational activities, by comparison with the lack of information or insufficient information provided as to whether these extra-occupational activities are permitted.
- Inconsistency of rules: Individual employees should be provided with coherent legal provisions that help their unambiguous application and interpretation in practice. The division of regulations between the Public Employment Statute and the collective agreements was considered as a potential source for differing interpretation.

The results of the inquiry caused the Government to provide unambiguous rules for the conflict-of-interest policy and particularly clarify the conditions under which extra-occupational activities can be accepted. In addition, the inquiry proposed that regulations should provide clear standards for areas where the risk to public confidence is particularly high. These areas principally include employment and positions in:

- Justice administration.
- Property administration.
- Public procurement.
- Exercise of public authority.
- Supervision.
- Leadership of public administration.

Box 7. **Policy review and revision: The case of extra-occupational activities in Sweden** *(cont.)*

The inquiry did not find evidence to make special regulations necessary for other specific areas such as the tax authority and the customs administration.

Updating the legal framework

In response to the findings and suggestions of the inquiry, the Government also took into consideration the recent legislative efforts and existing practice in a number of OECD countries from Europe and North America when the existing regulations were amended both in scope and form:

- The extra-occupational activities that are considered to *adversely affect public confidence*, are now included in the legislation instead of collective agreements. Moreover, the secondary legislation enacts the rules for employees of municipalities and county councils regarding extra-occupational activities that adversely affect public confidence.
- The rules on extra-occupational activities that *adversely affect performance*, and those of a *competitive nature*, are included in collective agreements.

The need for explicit and unanimous standards across the whole public service regarding extra-occupational activities that adversely affect confidence was a substantial reason to provide the relevant regulations for all public servants in a single document.

* Committee Inquiry appointed by the State on extra-occupational activities of public employees. *Statens Offentliga Utredningar* (SOU). The report on extra-occupational activities (*Offentliga anställdas bisysslor, Betänkande av bisyssleutredningen*, SOU 2000:80) can be consulted on the Internet at *http://justitie.regeringen.se/propositionermm/sou/pdf/sou2000_80.pdf*

E. Identifying and resolving conflicting situations

While most countries have formulated core principles as a key ingredient of their conflict-of-interest policy, they also employ various legal and management frameworks that enable officials to identify, avoid and manage potential conflicts of interest. In putting core principles into practice, countries primarily:

- Specify, in general terms, the situations and relationships that are considered to be conflicts of interest. Countries with a strong administrative law culture employ "the principle of exclusive service" that requires full dedication to discharge of public duty. These countries specify those activities that are incompatible with fulfilling a public function and also identify exceptions that require declaration of the interest to the employer organisation, and to request consent of the employer, regularly, in written form. Countries also list specific situations that are subject to statutory limitations.

- Put in place management arrangements to identify, avoid or manage the conflicts in daily practice, including guidelines to help officials recognise actual or potential conflicts. Clear procedures and accountability mechanisms that clarify the responsibilities of public officials and their managers are the cornerstones of supporting management systems. They make it clear that it is crucially the responsibility of the public official concerned to inform a manager or a superior of the existence of conflict of interest or potential conflicting situations. The manager has the formal responsibility to decide on what measures to take to resolve or manage the actual or potential conflicting situation.

While the ultimate responsibility is on individual officials to recognise in which situations conflicts may arise between their private interest and public duties, countries seek to define *the most exposed areas* for which instructions and guidance are necessary to prevent and resolve conflict-of-interest

Box 8. **Evolution of conflicts of interest: Three stages**

Avoiding the personal bias in public decision-making is a long-standing consideration that goes back centuries. The ancient principle of "no one may judge his/her own case" was extended to family members and other close personal relationships that could improperly influence decisions in administrative and judicial processes. Personal gifts to decision-makers were similarly considered as potential for bias.

The doctrine of the separation of powers introduced a second stage of limitations for public officials. Ensuring the politically non-partisan character of the public service is a key component that emphasises the new idea of impartially serving the public interest through providing professional service to the government of the day. Countries generally avoid multiple appointments of officials in other branches of government where the resulting conflict could damage the proper functioning of systemic checks and balances.

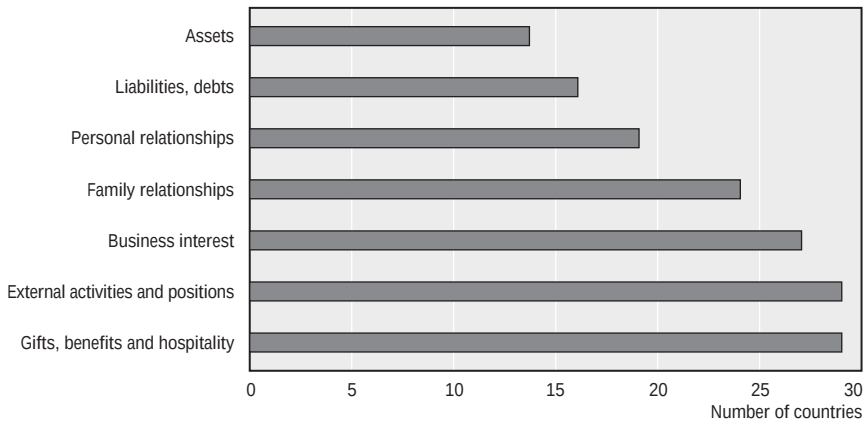
The third stage arises from the rapidly changing public-private sector interface, with increasing interchange of personnel, outsourcing and transfer of traditional public services, together with expanding new forms of financial investment and diverse business involvement. New issues concerning the pecuniary and other private interests of public officials give rise to an increased range of possibilities for conflict of interest. Increased public scrutiny, assisted by new forms of transparency provided by the use of new technologies, encourage governments to provide new standards concerning the third stage of conflict of interest, involving the economic interests of officials and their participation in the private and non-profit sectors.

situations. The following figures indicate the most commonly determined activities and situations in OECD countries.

In addition to the traditional kinds of gifts to public officials, conflict-of-interest policies in OECD countries primarily focus on new forms of benefits

Figure 3. **Activities and situations holding potential for conflicts of interest for public officials**

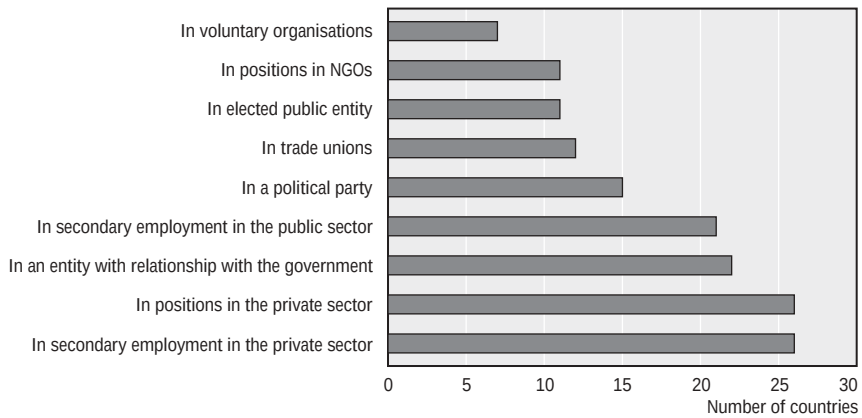
Which activities and situations are identified as holding potential for conflicts of interest for officials?



Source: OECD.

Figure 4. **External activities and situations holding potential for conflicts of interest**

Which external activities and positions are identified as holding potential for conflicts of interest for officials?



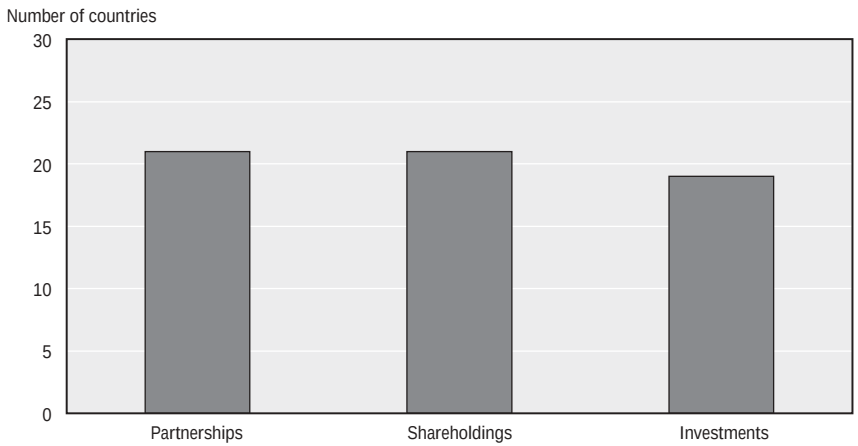
Source: OECD.

and hospitality at the time when public officials work in particularly close relationship with the private sector. Similarly, ancillary employment arrangements and taking positions, either outside or inside the public service, are considered as a major potential for conflicts of interest. Countries have further specified restricted activities, such as playing golf or travelling with an interested party in Japan, or sensitive areas, such as dealing with members of Parliament who have approached departments in a private capacity. Public servants may also need approval before accepting a decoration or medal offered by a foreign government.

An increasing number of countries has established specific policy that deals particularly with the business interests of public officials. In this context, partnerships, shareholdings and investments are considered as major sources for conflict of interest.

Figure 5. **Business interests and activities holding potential for conflicts of interest**

Which specific business interest and activities are identified as holding potential for conflict of interest for public officials?



Source: OECD.

In certain situations the core values of the public service might be in tension with basic citizens' rights: for example, public servants' political activities might conflict with their primary duty (and legal obligation) to serve the government of the day in a politically neutral manner. While some countries expressly prohibit positions and active involvement in political parties and trade unions as well as participation in strikes, others permit the pursuit of such private interests as long as it is done in a clearly private capacity and does not cause a conflict of interest.

The survey covered neither institutional conflict of interest nor the situations of conflicting loyalties or obligations which can arise where a public official hold multiple official positions. These are different in nature:

- An "institutional conflict-of-interest" situation can occur when a public *organisation* has a dual role, for example, as a regulator and a service provider or owner. However, "institutional conflict of interest" can put in danger functional markets by making impartial decisions that favour the own commercial interests of the public authority concerned and unfairly disadvantage other competitors.
- In the latter case, there is *no private interest* of a public official involved, instead competing duties to serve the public interest or conflicting loyalties can emerge from multiple positions of the public official.

F. Incompatibility: Restricting unavoidable, serious and pervasive conflicts

Activities regarded as significantly affecting the full and proper exercise of official duties are considered as incompatible with public service employment. In cases of unavoidable, serious and pervasive conflicts of interest, the legal regulations restrict public officials from these activities and positions. For example, following the doctrine of separation of powers, civil servants can be strictly prohibited from being a member of Parliament. Moreover, to ensure the political neutrality of the civil service, they are generally not allowed to hold office in a political party or undertake an activity on behalf or in the name of a political party, apart from standing as a candidate in the general or local elections. Countries also determine activities and positions in the private sector as incompatible with public functions. These are generally defined when the official duties and responsibilities of the public official are *ipso facto* considered to be adversely affected by the specified private sector activities or positions.

Those activities and positions that are defined as incompatible with public officials' positions set the baseline requirements, and are enacted mainly in legal regulations. The scope and rigidity of regulations widely vary between countries. On the one hand, countries with long administrative law tradition have formalised extensive and highly developed regulations listing cases of incompatibility. On the other hand, most Scandinavian countries minimise regulation, and cases are treated on an individual basis and on their merits.

Overall incompatibility related to political activities and pecuniary interests. With regard to *political activities*, specified groups of public officials are prohibited from taking an active part in political parties, and holding an office in trade unions and elected public entities. Setting specific standards for

the election period, for example for public servants running for elected office, is an emerging trend in OECD countries.

Countries with strong administrative law traditions in continental Europe as well as other OECD members in the Americas and Asia have produced a rigorous list expressly identifying incompatible activities and situations for public officials. In Japan, for example, these include the prohibition of political activities for public officials in general, and organising or joining employee organisations by police personnel and personnel working in the Maritime Safety Agency or in penal institutions. Solicitation of political contributions under certain circumstances is prohibited for executive branch officials in the United States.

Central European countries have developed strict regulations to provide public officials with a clear list of restricted activities. These measures provided necessary conditions for creating an impartial public service in the course of transition to democracy. In Poland, for example, all forms of participation in political parties and functions in trade unions are prohibited for civil servants. Furthermore, employees of state offices cannot perform functions in management and supervisory boards and they are also prohibited to own more than 10% of shares in a commercial company. Similarly, the Czech Republic prohibits:

- Membership in political parties for employees of intelligence services, policemen, custom officers, prison guardians and firemen.
- Holding a function in a political party for prefects and their deputies, municipal managers and directors of regional offices.

Likewise, civil servants are prohibited from holding an office in a political party, and making public appearances or statements on behalf of a political party in Hungary.

In contrast, Norway, for instance, has no formal restriction other than that derived from the separation of powers: the prohibition on a civil servant being elected as a member of the Parliament, for example. Instead, the incompatibility is to be determined in individual cases and on the basis of legal and ethical principles. Neither does the Act of Civil Servants in Denmark specify incompatible activities: similarly to Norway, the principle of individual case is applied. Iceland also follows this Scandinavian model.

Pecuniary interests are generally regarded as the other major source for incompatibility. In general, OECD countries hold a strict position and prohibit a wide-range of private activities, such as secondary employment and particularly involvement in management bodies of private commercial companies. Limiting official's shareholdings in private companies is an emerging trend. In Poland, for instance, the law[10] explicitly prohibits the holding of more than 10% of shares in companies under commercial law or

Box 9. **Incompatible political activities for specific groups**

While countries with a strong administrative law tradition generally provide a comprehensive list of activities and posts incompatible with a wide range of positions in the public service, other countries prefer to specify particular requirements for certain groups only. In Australia, for example, employees of the Electoral Commission must not engage in any political or electoral activity that would compromise the strict political neutrality of the Commission.

In the United Kingdom, all board members of Advisory Non-Departmental Public Bodies must not hold any paid or high-profile unpaid posts in a political party, nor engage in specific political activities on matters directly affecting the work of this body.* When engaging in other political activities, board members are required to be conscious of their public role and exercise proper discretion. These restrictions do not apply to members of Parliament (in those cases where they are eligible to be appointed), to local councillors, or to Peers in relation to their conduct in the House of Lords. The *Parliament of Canada Act* prohibits senators and members of Parliament from any compensation for providing services in relation to the Senate or the House of Commons.

* The *Model Code of Practice for Board Members of Advisory Non-Departmental Public Bodies*, published by the Cabinet Office can be seen on the Internet at *www.cabinet-office.gov.uk/central/1998/mcp_0998.htm*

shares representing more than 10% of capital stock in any companies. In Japan the *National Public Service Law* prohibits a wide range of financial activities and positions, including:

- Concurrently holding an executive position in a profit-making enterprise.
- Accepting a position in a profit-making enterprise that is in close connection with an agency of the State.
- Holding a position in which a public servant is able to participate in the management of a private sector enterprise, because the public official holds stock in the enterprise, or because other relationships that are deemed to be inappropriate with respect to the performance of official duties.
- Concurrently holding an advisory position in any undertaking other than a profit-making enterprise, or engaging in any other undertaking or carrying on a business, and receiving remuneration without the permission of the Prime Minister and the head of the official's employing government agency.

In addition, the *National Public Service Ethics Law* and the *National Public Service Ethics Code* introduced further specific prohibitions in April 2000, such as:

- Receiving a gift of money, loan, rent, goods or services from an interested party.
- Accepting the hospitality of an interested party.
- Playing golf or travelling with an interested party.

In Canada, public office holders are prohibited from a wide range of activities and positions, including practising a profession, the active management or operation of a business or commercial activity, a directorship or office in a financial or commercial corporation, an office in a union or professional association, or a position as a paid consultant. Public office holders must resign from such positions, and make a public declaration of their resignation. The officials of the Austrian Court of Auditors are not allowed to be a member of the management of a private company which could be audited by the Court of Auditors.

Box 10. **Incompatible activities for municipal councillors in Portugal**

A significant number of countries have elaborated special rules for public officials working at the sub-national level. In Portugal, for example, although elected **municipal councillors** performing their function part-time are allowed to carry out ancillary activities in general, the following are considered as incompatible with their function:

- Being a member of governing bodies of public corporations, statutory undertakers and of companies that are mostly or entirely state-owned.
- Providing professional services, consultancy, advisory services and legal assistance to public corporate bodies, statutory undertakers or companies participating in public invitation of tenders.
- Carrying on a business or industrial activity in the ambit of the corresponding municipality, on his own or by means of an entity in which he/she holds a share.
- Participating in government calls for tenders, services, sub-contracting or undertakings or in any other calls from corporate bodies of public law, or participating in such tenders called by companies the share capital of which is mostly or exclusively state-owned, or called by statutory bodies.
- Providing legal assistance to foreign states.
- Personally and unduly benefiting from actions or contracts, the creation of which was under their direct influence.

G. The need for positive management

Determining the activities and positions incompatible with public duties sets the base-line boundaries for public officials. When countries set these base-line rules they need to consider how to find an equilibrium that provides clear and realistic standards for public officials to comply with in their daily work, and these standards also reflect the evolving concerns of the society and business community.

In a rapidly evolving public sector environment, conflicts of interest can never be fully eliminated. Excessive restrictions may also deter qualified professionals from accepting public office. Consequently, a modern conflict-of-interest policy seeks to strike a balance by:

- Enabling public officials to identify and avoid unacceptable forms of conflict.
- Making public organisations aware of their presence.
- Ensuring effective disclosure and resolution to diminish their consequences.

The potential for conflict-of-interest situations may be unavoidable. Particularly in smaller countries in case of positions requiring specific knowledge and experience (such as top management appointments) when only a few individuals may possess critical skills, and there is a high demand for them both in the public and the private sectors. It may be possible to managing a conflict of interest as the only solution when seeking to appoint such experts to a position in the public sector in order to obtain the benefit of their crucial knowledge and expertise in specialised areas.

Measures aiming at identifying concrete conflict-of-interest situations generally focus on current employment or appointment. The principal instrument used by OECD countries in this area is to require applicants to disclose information on their personal interests (and those of immediate family members specified by law) when they take up their public duties and also report immediately conflicts emerging in the future. Very few countries also require candidates for public service to declare their previous or existing ancillary responsibilities prior to their appointment.

Requesting information on post-public employment arrangements is an emerging trend in the OECD area. Nowadays quarter of countries request their public officials to provide information on their proposed post-public employment arrangements on leaving public office. In Poland, for example, civil servants are obliged to submit a final asset disclosure statement in which they should list their real estate ownership, other properties, pecuniary interests and their business involvement (membership of the management board, supervisory board or audit commission of a company under commercial law, etc.). Up to one year following the end of their tenure, civil servants cannot be

employed by, or perform other activities for, a business entity if they were involved in the official decisions of cases concerning the business. The prohibition for local government officials to receive any gifts or benefits from parties to decisions in which the official participated in an official capacity remains in force for three years after terminating their office. Senior public office holders are obliged to obtain the consent of a special commission responsible to the Prime Minister in order to undertake employment in an entity that was supervised by the former state official. In Canada, while the "cooling-off" period is one year for public office holders in general, ministers are required to wait for two years before taking employment with any organisation with which they had direct and significant official dealings during their last year in public office.

Box 11. **Requesting annual written statements in Ireland**

In Ireland, the 1995 *Ethics in Public Office Act* introduced annual written statements of certain personal interests for a wide-range of senior public office holders, including:

- Members of the *Oireachtas* (Parliament).
- Office holders, such as the *Taoiseach* (Prime Minister), ministers, Chair and Deputy Chair of both the Lower House and the Upper House.
- Senior special advisers.
- Senior public and civil servants in designated positions.
- Designated directors of state bodies.
- Senior executives holding designated positions in state bodies.

The Irish system makes a clear distinction between the most senior public positions, accountable to the public, and lower public positions that are generally management functions. While annual statements of Parliamentarians and of "office holders" such as the Prime Minister and ministers are entered in a register and published, those of the senior special advisers are laid before the Houses of *Oireachtas* and also given to the Public Offices Commission. The annual statements made by public and civil servants, directors and executives will be available to the Public Offices Commission either automatically or on request.

Annual statements must include those interests of a spouse or child that could materially influence them in the performance of their public duties, however, the personal interests of a spouse or child is kept confidential.*

* The forms of Statement of Interests together with the two respective guidelines issued for public servants and office holders on compliance with the provisions of the *Ethics in Public Office Act* can be viewed on the website of the Public Office Commission at: *www.sipo.gov.ie/ethic.htm*

In order to establish and maintain trust in newly created elected institutions *public disclosure systems* have been introduced for elected public office holders, particularly for members of Parliament, for example in Central European countries. The Czech Conflict of Interest Act obliged members of parliament, senators, members of the Government and heads of central administrative offices to disclose details of their personal interest and those of their immediate family, including proprieties, activities, incomes and gifts they received.[11] In addition to the public disclosure register for members of the Hungarian Parliament, the revision of the Civil Service Act in June 2001 introduced confidential reporting procedures for a wide-range of civil servants:

- State secretaries, deputy state secretaries and other senior officials involved in decision-making should submit their declaration annually.
- Director generals, deputy-director generals, heads of department, government and ministerial advisors are obliged to provide their asset declaration every two years.

Moreover, public officials in other branches of government, such as members of the Constitutional Court, judges, public prosecutors, ombudsman, mayors and members of local self-government councils, are also requested to disclose information on their assets.

Similarly, the devolution process in the United Kingdom paid special attention to creating and maintaining trust in the new representative bodies. The pre-election consultations on how the Scottish Parliament would operate also addressed the expected conduct of the members of the Scottish Parliament (MSPs) and formed a special Working Group to deal with this issue. The final report of the Working Group recognised that "the Scottish electorate will have high expectations of their MSPs and the way in which they should behave ... MSPs must fulfil those expectations because they will have a key role in addressing the public cynicism and disillusionment with the political process ... by ensuring that their conduct as MSPs is above reproach". As a key measure, Order 1999[12] requires all MSPs, the Lord Advocate and Solicitor General for Scotland to register the following financial interests in the Register of Interests of members of the Scottish Parliament.[13]

- Remuneration – being employed or self-employed, being the holder of an office or partner in a firm, etc. and related undertakings.
- Election expenses – donations.
- Sponsorship – receiving any financial or material support on a continuing basis to assist MSPs as a member.
- Gifts – receiving a gift of heritable or moveable property or a gift of a benefit in kind with the value over GBP 250.

Box 12. **Setting standards for public office holders at the supra-national level: European Union**

Avoiding conflict of interest is an emerging issue in multi-cultural environments, such as an international organisations and supranational bodies. The European Union developed tailored standards for members of the European Commission (Commissioners) and Members of the European Parliament (MEP). A Code of Conduct requires **Commissioners** to maintain their independence from any national government and other body and specifically limits their outside activities, Commissioners:

- May not have any outside engagement in any professional activity, whether paid or non-paid.
- May not hold any public office of any kind.
- May be active members of political parties or trade unions if it does not disrupt their work at the Commission.

Furthermore, Commissioners may not accept any gift of a value exceeding EUR 150 – if so they should hand them over to the protocol department. Concerning their post-employment, Commissioners should inform the Commission on their post-employment engagement in the year after leaving office. The Commission, or if necessary an *ad hoc* ethics committee, decides on the appropriateness of the post-employment position.

Commissioners are obliged to make a public declaration on their outside activities (posts in foundations and educational institutions), financial interests (shares and other stocks), assets (real estate and other property) and spouse's professional activity.[1]

The **European Parliament** also requires their members to exercise their mandate independently. MEPs should not accept gifts and benefits in the performance of their duties; they should make and sign a declaration of personal interests that are also made public on the Internet.[2] These include the following declarable personal interests:

- All professional activities and other remunerated functions or activities.
- Any support, financial, material or human resources, received in connection with political activities in addition to those provided by the European Parliament.

When MEPs fail to fulfil the obligation to provide their declarations for the register, the President has to remind them to comply within two months. If submissions are not delivered by then, names of MEPs along with the infringement are published; non-compliance can lead to suspension. In addition to the annual declarations, the Rules of Procedure request MEPs to disclose orally any direct financial interests related to the subject under debate before speaking in Parliament or one of its bodies, or when an MEP is proposed for rapporteur.

1. The declarations of commissioners' interests can be viewed in the website of the European Commission at *http://europa.eu.int/comm/commissioners/interests/index_en.htm*
2. The declarations of financial interests of MEPs can be accessed in the web site of individual MEP at *wwwdb.europarl.eu.int/ep5/owa/p_meps2.repartition?ilg=EN&iorig=home*

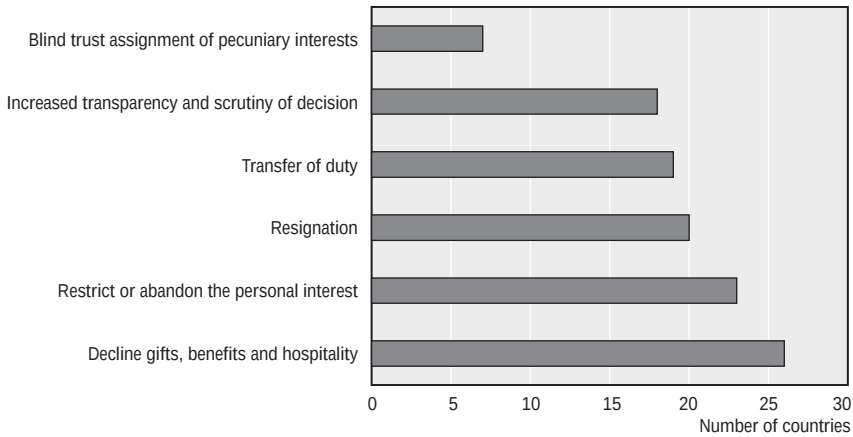
In addition, MSPs should also provide information for the Register on:

- Certain overseas visits.
- Heritable property not used as residential home if its market value is greater than GBP 25 000 or the annual income from it is greater than GBP 4 000.
- Interest in shares that are greater than 1% of the issued share capital or its value is greater than GBP 25 000.

The requirements of the transitional order were considered as temporary only, although they were planned to be governed by an Act of the Scottish Parliament. More recently the *Code of Conduct for Members of the Scottish Parliament*[14] set key principles and standards for MSPs concerning the registration of MSPs' financial interests and also required the registration of members' staff interests.

Figure 6. **Measures for resolving conflict-of-interest situations**

What measures are used to resolve conflict-of-interest situations?



Source: OECD.

Countries may also require the public disclosure of pecuniary interests from representatives at sub-national level. In Australia "the pecuniary interests of councillors, council delegates and other persons involved in making decisions or giving advice on council matters must be publicly recorded".[15] The *Local Government Act* specifically indicates what disclosures must be made and when, and the procedure for managing a pecuniary interest complaint. The Act also established the Local Government Pecuniary Interest Tribunal that conducts hearings into complaints and takes any necessary disciplinary action.

However, as the simple declaration of a personal interest does not of itself resolve a conflict, additional steps are necessary. Measures can range from the simple decline of gifts, benefits and hospitality, divestment of conflicting private interests and transfer of duty, up to resignation. The majority of OECD countries has established mechanisms for increased transparency and scrutiny of decisions. Reflecting the close relationships between the private and public sectors, an emerging trend in the OECD area to introduce "blind trust" assignments of pecuniary interests or "arm's length" management agreements, as the following figure shows.

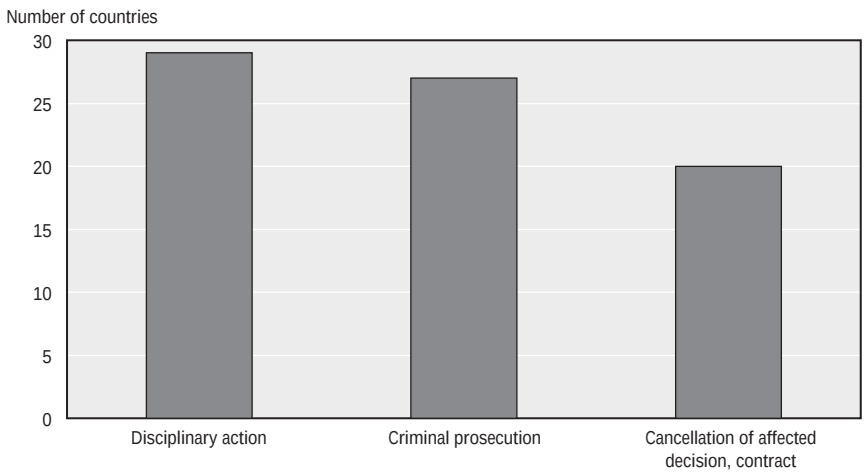
H. Consequences of breaching the policy

Countries reported a wide variety of consequences that can be categorised into:

- *Personal* consequences, including disciplinary actions and criminal prosecution.
- *Management* consequences, that can range from advice to the cancellation of affected decision to correct the material consequences of compromised decisions and tainted contracts.

The most widely utilised measures in OECD countries are disciplinary actions and criminal prosecution, along with the cancellation of tainted decisions and contracts, as indicated in the following figure.

Figure 7. **Sanctions for breaching the conflict-of-interest policy**
What is the sanction for breaching the conflict-of-interest policy?



Source: OECD.

Depending on the seriousness of the breach, disciplinary sanctions can range from warning and reprimand through fines and re-arrangements of duties, to suspension and removal from office. In regard to non-disclosure, not only do all countries employ sanctions, but measures also show similar solutions in administrative and disciplinary sanctions. Non-disclosure of conflict of interest is generally considered a serious breach, and it results in disciplinary action or even criminal penalties in countries such as in Austria, France, Ireland, Italy, Korea and Slovakia. Hungary introduced severe sanctions for non-compliance with the formal disclosure requirements by the 2001 modifications of the Civil Service Law: the civil service status is automatically cancelled by the law if civil servants do not complete and provide their financial disclosure forms in time. Deliberate non-compliance with the requirement to provide an appropriate declaration leads to a loss of office for senior officers in Portugal.

Box 13. **Setting proportional sanctions**

The nature of the position is taken into consideration when countries determine appropriate personal consequences for breaching the conflict-of-interest policy. The following list of personal consequences indicates the variety of severe sanctions applied to different categories of officials in *Portugal*:

- Loss of mandate for political and senior public office holders, advisors or technical consultants.
- Immediate cessation of office and return of all sums which have been received for ministerial advisors.
- Three-year suspension of senior political duties and senior public duties for senior civil servants.
- Loss of office in case of managerial staff.
- Fine and inactivity or suspension for civil servants and contractual staff.

Similarly in *Canada*, at the federal level the measures and personal consequences are different for public office holders and public servants:

- For *public office holders*, the Office of the Ethics Counsellor provides advice along with education about ethical conduct, in order to prevent conflicts and help to resolve ethical dilemmas. In case of complaints regarding alleged breaches to the Code, the Ethics Counsellor will inquire and determine whether a breach actually occurred and make recommendations. Breaches of the Criminal Code can lead to investigation and criminal prosecution.
- For *public servants*, disciplinary actions may include dismissal where the *Conflict of Interest and Post-Employment Code for the Public Service* has been seriously breached. In addition, criminal prosecution is possible in the case of a breach of the Criminal Code.

For civil servants, disciplinary sanctions generally range from reprimand to dismissal. When political or senior post holders do not disclose their relevant personal interests, it may interrupt their career (loss of mandate for elected officials and dismissal in case of appointed positions). In Portugal ministerial advisors, in addition to losing office, should also reimburse the remuneration they have received.

Disciplinary action is the primary personal consequence in OECD countries. The following list outlines a range of sanctions that can be used in disciplinary procedures against public servants:

- Caution and warning.
- Fine or reprimand.
- Reduction in salary.
- Reassignment of duties.
- Delay in career, transfer of duties.
- Dismissal, termination of employment

In addition to the sanctions applicable during employment, very few countries also introduced sanction that can be used after the termination of employment, such as the loss of retirement pension. In Germany, in case of retired civil servants the disciplinary action can demand that maximum 30% of the pension be retained.

Box 14. **Disciplinary sanctions in France**

In France, where both disciplinary and penal measures can be applied, the following forms of disciplinary sanction can be used in the public service:

- Warning.
- Striking off from the promotion list, reduction in rank, temporary suspension from duty for a maximum of 15 days, transfer of duty.
- Demotion, suspension from work from 3 months to 2 years.
- Dismissal.

Sanctions are applied as an ultimate option in disciplinary procedures in cases where inappropriate conduct was proved. Public servants are also obliged to eliminate the cause of the conflict-of-interest situation, for example, by suspending those activities that were carried out without authorisation, or with authorisation but based on inappropriate disclosure. In addition, tainted decisions may also be cancelled if they were prepared or

made by officials who did not disclose their relevant personal interests. An emerging trend is to provide the legal possibility that the tainted decision could be cancelled and the company "black-listed", explicitly excluding from further bidding for a specified term, for example, when it is proved that an official with adjudicatory power holds a personal interest related to a company participating in the bidding process.

As a first step, some countries prescribe consultation and advice, as a practical prevention measure, along with information-sharing and awareness-raising methods. These management measures are particularly widely used in countries with a high level of trust in public institutions, for example in Australia, Canada, New Zealand and Sweden, where the immediate manager plays a crucial role in ensuring compliance with the organisation's conflict-of-interest policy.

I. Putting policy into practice: Information, consultation and monitoring compliance

OECD countries generally combine rigid legal instruments with flexible complementary management tools to communicate and inculcate the standards of conflict-of-interest policy. In this framework the manager plays a critical role in effectively preventing conflict-of-interest situations and enforcing the policy. Managers, together with other leaders, also remain the principal source for providing a personal example for their subordinates. This section outlines the general trends in the following three key dimensions of implementation:

- Provision of information, particularly the ways in which public officials are informed about the conflict-of-interest policy.
- Consultation in case of doubt, usually involving a variety of sources of advice.
- Monitoring the policy implementation and enforcing compliance.

In regard to the provision of information, the common practice is providing training for public officials in order to brief public officials on existing regulations and policies in place. Induction training for new entrants is accompanied by in-service training in some countries, for instance in Germany, Poland and the United States which have developed special training programmes.

In the United States each agency provides an ethics training programme that ensures that all executive branch employees are aware of the core principles and standards of the policy along with the available sources of advice. In addition, selected groups – such as Presidential appointees – receive individual briefings before entering office, and they also take part in annual

ethics training. The central ethics agency, the Office of Government Ethics (OGE) offers a variety of ethics training workshops and seminars to the designated agency ethics officials working in the executive branch. These training workshops focus on applying the standards of ethical conduct, criminal conflict-of-interest statutes, and public and confidential financial disclosure requirements in day-to-day work. OGE also provides a wide variety of publications[16] on standards of ethical conduct for employees of the executive branch, including:

- *Booklets* on the conflict-of-interest statutes and the standards of ethical conduct applied to executive branch employees. These booklets provide an easy-to-read, anecdotal treatment of some of the basic ethics laws and regulations.
- *Pamphlets* about the basic conflict-of-interest laws and regulations.
- *Videos and software* to assist executive branch officials in the administration of agency ethics programmes.
- *Informal advisory letters and memoranda, and formal opinions* on the interpretation and compliance with conflict of interest, post-employment, standards of conduct, and financial disclosure requirements in the executive branch.

Similarly, in New Zealand, where the State Services Commissioner (SSC) has the task of reviewing the performance of chief executives in the public service on behalf of their responsible Ministers, the SSC provides a resource kit,[17] designed to support structured discussion among public servants about values and how they should apply these to everyday situations. The resource kit comprises:

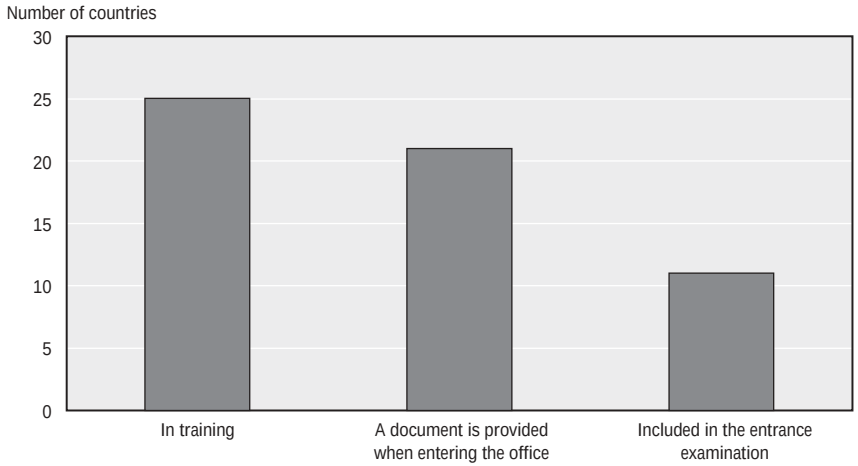
- New Zealand *Public Service Code of Conduct.*[18]
- Facilitation guide – containing suggestions for facilitating discussion sessions on public service values using the video, the Code of Conduct, and a set of values-based stories.
- A 20-minute video – exploring values and, in particular, the importance of trust and integrity in the Public Service.
- A CD-ROM – that provides all of the above mentioned material in an electronic format.

The State Services Commissioner also provides guidance to the whole State sector on values and integrity including:

- Principles, conventions and practice guidance papers that inform senior managers on ethical conduct.
- Specific guidance for public servants in election years.
- Guidance on the behaviour and responsibility of public servants before a Parliamentary Select Committee.

Figure 8. **Informing officials on the conflict-of-interest policy**

How are public officials informed of the conflict-of-interest policy?



Source: OECD.

While OECD countries mainly focus on the induction period in order to ensure that public officials are aware of the rules of conflict-of-interest policy, as indicated in the following figure, countries also seek to institutionalise the provision of information on the conflict-of-interest policy by, for instance, including relevant standards in appointment contracts.

While training and distribution of policy documents are the principal measures for awareness raising, managers play a crucial role in creating a working environment with open communication between the employer and employees where the actual difficulties of implementing the conflict-of-interest policy can be openly raised and discussed. In order to develop such an open organisational culture, managers need help through central support mechanisms provided by governments. These central support mechanisms can also offer a unified framework across the whole public service for ensuring consistent interpretation and application of the stated policy standards.

In order to increase their practicality, guiding documents could provide public officials with general principles and standards as well as specific examples of complying and non-complying conduct. In Canada, a guide was developed to serve as a reference tool for the application of the *Conflict of Interest and Post-Employment Code for the Public Service*. This guide provides a collection of best practices from various departments as well as examples of situations public servants encountered most frequently. They aim to enable public servants to benefit from past experience while fostering consistent

Box 15. **Providing information on the policy: Germany**

The federal administration makes use of a variety of tools to provide information on the conflict-of-interest policy. Special training courses are organised for civil servants to:

- Provide information on the principles and relevant legal regulations.
- Give instructions about the concrete measures for avoiding conflict-of-interest situations.
- Focus on principles and daily practices of co-operation and management, social competence and responsible behaviour.

In addition, training courses for the executive service in the federal administration deal with such issues as self-image, social behaviour, communication and management, competence in grass-roots administration.

All ministries and subordinate authorities also distribute copies of the Federal Government Directive containing a *Behavioural Code against Corruption* or make it available to their employees in electronic form.

application of the Code. Although the guide provides case studies and suggested responses, it emphasise the importance of evaluating their applicability based on the individual situation.[19] Correspondingly, the publication of *Ethical Principles for Judges* provides judges with a concise yet comprehensive set of principles addressing the many difficult ethical issues that confront judges as they work and live in their communities. The publication also includes examples from Canada and foreign jurisdictions, to promote a more complete understanding of the role of the judge in a modern society and of the ethical dilemmas they so often encounter.[20] In Australia, the New South Wales Independent Commission Against Corruption developed a guide for public servants that combines general principles with concrete examples based on actual cases to give advice such as quoted in the following box.

Although there is a wide-variety of internal and external sources for counselling, the majority of OECD countries have assigned this role mostly to managers and superiors. They also play a central role in resolving conflict-of-interest situations: officials are asked to inform their manager or immediate superior who has the primary responsibility for determining what measures should be taken when such conflicts actually arise. The following figure indicates the sources that can be consulted when officials are in doubt. In addition to their managers, dedicated persons within the organisation (for example ethics officers, human resource management or legal staff) as well as

Box 16. **Providing examples of conflict-of-interest situations**

1. Tendering and purchasing

An organisation has advertised for a firm to supply and fit office equipment. A member of the panel assessing the tenders has shares in one of the firms which has submitted a bid. *This may affect, or it may reasonably be suspected that it could affect, his or her ability to make an unbiased decision.*

2. Staff recruitment

A member of a selection panel has a close relationship with one of the applicants for the job. *This conflict of interest could bias, or could reasonably be expected to bias, the decision of the panel.*

3. Secondary employment

Two police officers have second jobs as security guards at a nightclub. Local residents have complained to the police several times about noise levels at the club and problems with drunks, but no action appears to have been taken. *The impartiality of the police officers has been compromised as it may be perceived that they are using their influence to make sure the club is not investigated.*

4. Dealing with former public officials

A senior employee of a government department awarded a particular firm several valuable contracts. Shortly after awarding the contracts, he resigned from his job and went to work for the firm. *It could appear that the offer of employment was a personal benefit, in return for favours given.*

5. Gifts, benefits and hospitality

A regular supplier offered the purchasing officer of a government department a free weekend for two at a beach resort. *The officer's impartiality when dealing with the supplier could be compromised if he/she accepted the offer.*

6. Local government planning approvals

A senior council planner often had to advise applicants on how to make their development applications comply with the council's codes. He/she suggested to some applicants that they should use the services of a local architectural firm where his/her brother worked. Although the necessary work was mainly done by staff at the firm, the planner was sometimes paid to prepare the drawings himself. The planner's job was to act in the public interest and to provide impartial advice about council policies. *By recommending his/her brother's firm, he/she put the private interests of his brother and him/herself before his/her public duty.*[*]

Box 16. **Providing examples of conflict-of-interest situations** *(cont.)*

7. Elected officials

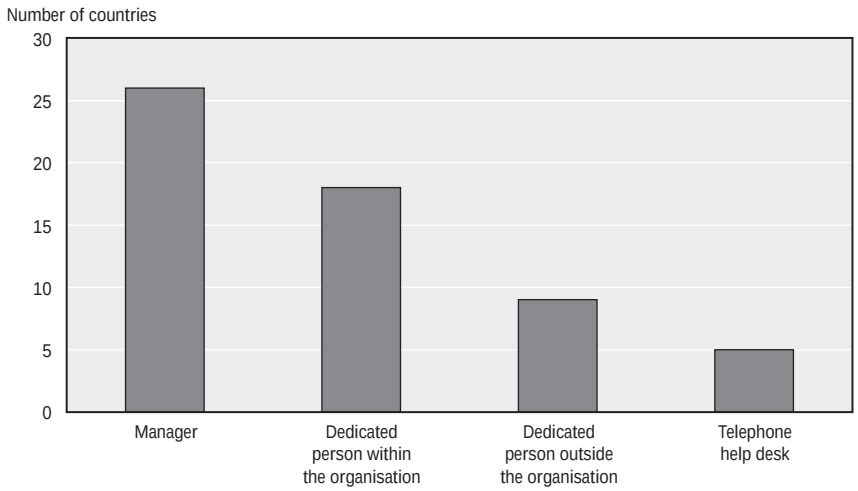
Many councillors have business and professional interests in the local government area they represent. *Conflicts can arise if their public positions allow them access to information and opportunities that could be used to advance their personal and business interests. For example, a councillor may be tempted to influence an application to set up a new business in the town if his own business could lose custom as a result.*

* An institutional conflict-of-interest situation can occur when councils have a dual role as developer and regulator. Councils that decide to develop a piece of land they own may make decisions in their own commercial interest and unfairly disadvantage other developers.

Source: Practical Guide to Corruption Prevention, Independent Commission Against Corruption, New South Wales, Australia. The Guide with further examples and concrete case studies can be seen on the official website of the Independent Commission Against Corruption, New South Wales at *www.icac.nsw.gov.au/pub/public/pub2_27cp.cfm#P1223_187397*

external organisations (for instance independent commissions, ethics offices or the trade unions) can also provide advice in certain countries, for example in Canada, Denmark, France, Japan, Poland, Switzerland and the United States. The secretariat of an ethics commission can be consulted in France, the Ombudsman can be contacted for guidance in Poland, while a trade union representative can provide advice in Denmark.

Figure 9. **Sources available for consultation in case of doubt**
Who can be consulted if an official is in doubt?



Source: OECD.

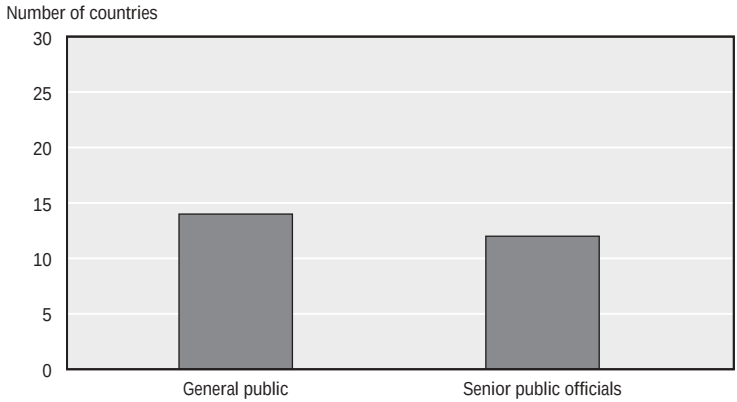
In regard to monitoring compliance, most often managers play the most important role in ensuring whether their staff comply with the rules in the respective organisations. However, central government organisations (for example civil service departments) and external institutions (civil or public service commissions, auditor generals, inspector-generals, ombudsman and even constitutional courts) could also take an overall interest in monitoring the implementation of the conflict-of-interest policy in general, or more specifically the compliance of the most senior officials. In Canada, for instance, two different institutions are defined to examine compliance with the policy, namely:

- The Ethics Counsellor of the Government of Canada has responsibility when Ministers and other public office holders are involved.
- The Treasury Board Secretariat is the designated central authority for monitoring compliance when public servants are involved, while heads of departments and agencies are also responsible for the application of the policy in their departments and agencies.

Providing more details on the implementation of the conflict-of-interest policy for senior officials in the public service, and particularly for the wider public, is an emerging concern in OECD countries, although less than half of the member countries provide information officially on the enforcement of the policy. Information has been provided both in *ad hoc* ministerial statements – for example in Germany, the Netherlands and the United States – and in regular reports, such as the annual report to the Parliament by the Public Service Commissioner in Australia. Public reports of supreme audit institutions, such as

Figure 10. **Providing official information about the enforcement of the conflict-of-interest policy**

Who is provided with information about the enforcement of conflict-of-interest policy?



Source: OECD.

the New Zealand Auditor-General's September 2001 report on *Financial Conflicts of Interest of Members of Governing Bodies*, provides helpful guidance to other agencies on recognising and dealing with conflicts of interest the. While the reports of the Auditor General of Canada have been regularly published, the report on the administration of the *Conflict of Interest and Post-Employment Code for Public Office Holders* and the related operations of the Office of the Ethics Counsellor of the Government of Canada was tabled, for the first time, before the Parliament in November 2002 and also made available for the public.[21]

Box 17. **The compliance circle in the Executive Branch of the United States**

In the Executive Branch of the United States, a circular system is in place in order to monitor the compliance of public officials with the policy:

- The first actor in this process is the Office of Government Ethics (OGE), which develops the Executive Branch wide *ethics policies* and specifies the frameworks of an agency's ethics programme.
- The *implementation* of the OGE developed programmes lies within the responsibility of each agency head. In order to carry out this function, the agency selects a Designated Agency Ethics Official (DAEO) who takes care of the *day-to-day activities* in accordance to the programme.
- The circle is completed when the OGE conducts its *regular audit* – that takes place every four to five year cycle – to monitor compliance with the defined programmes in the given agency. However, the OGE can start an audit within the four to five year cycle if the DAEO reports on non-compliance that requires corrective actions.

To enforce compliance by individual public officials, the responsibility lies with the agency in which the official is employed. Employees are encouraged to seek advice from the DAEO in case of any doubt about this policy: an employee who acts in good faith pursuant to the advice given by a DAEO will not be penalised even if the advice turns out to be wrong.

J. Assessing policy implementation: Procedures and driving forces

Assessment of implementation should be an integral part of any policy, to provide evidence-based feedback on the real impacts of the policy and effectiveness of policy measures. The results of assessments help policy-makers to fine-tune and further improve the policy standards, and also managers to put the policy into practice effectively. Practical objectives could include risk assessment at vulnerable areas, analyses of emerging issues and

also a review of recent developments in the policy to see whether new policy measures reached the expected objectives. An emerging issue for central governments is to realise the potential of assessments, by learning from existing assessment practices. However, assessing ethics programmes is the exception rather than the rule. The vast majority of countries explicitly indicated the absence of diagnostic tools in assessing the implementation of conflict-of-interest policies. Only a very small group of countries, such as Canada, Germany, Poland, Spain and the United States, use either specific tools or employee feedback mechanisms for assessing their policy implementation.

In Canada, the Office of the Auditor General of Canada has regularly reviewed ethics issues and has provided the findings in public reports. Furthermore, the government-wide public service employee survey sought the views of public servants on the actual impact of the *Conflict of Interest and Post-Employment Code for the Public Service*. The overall opinion from this employee feedback, that also served diagnostic purposes, was a positive one. The main considerations in reviewing the *Conflict of Interest and Post-Employment Code for the Public Service* were:

- Simplification of its language.
- Review of the policy on gifts and benefits.
- Retaining or re-hiring corporate memory to counterbalance growing demographic pressures in the Public Service.

In addition, the Treasury Board Secretariat set up the Office of Values and Ethics, which is the centre of expertise and leadership in issues on values and ethics within the Public Service of Canada. Among other things, it is responsible for the promotion of dialogue on these issues within the organisation, through guides, pamphlets, questionnaires and group discussion sessions.

While the vast majority of countries have not reviewed their existing laws in the last five years, some countries gave preference to the creation of new legislation to fulfil emerging needs, rather than reviewing existing regulations. Another general practice is the absence of involving civil society in the policy review process, with some exceptions. For example, in Poland, the media and citizens were recognised as contributors, and the same holds for Canada, the Czech Republic and the United States. Employee associations and non-government organisations were involved as partners in the review process in Portugal and Slovakia. In addition to the regular employee feedback mechanisms, the United States Office of Government Ethics has also invited the public to review proposed related regulations, which were published in the Federal Register both in paper form and on-line for comment. The deadline, normally over a sixty-day period, is indicated while government agencies, employees as well as the public can submit comments.[22] The OGE has summarised the impact of the comments on the content of the final regulation.

Box 18. **External assessment in the Executive Branch of the United States**

The ethics programme within the executive branch administered by the United States Office of Government Ethics has been assessed by external parties, in regard to:

- The effectiveness of the executive branch ethics programme from an employee perspective.
- The ethical culture of the executive branch.

The assessment was based on a series of questions that were answered by both employees and employers. In general, the OGE programme awareness turned out high, although it could be further improved, for instance by seeking advice from ethics officials. The study also indicated that the frequency of training was directly related to stronger perceptions of ethical culture and outcomes. Those employees that received training once a year or more had a significantly higher perception of ethical culture than those receiving less-frequent training. Furthermore, it emerged clearly that supervisors and managers are the best-targeted group for increased training in order to:

- Increase awareness.
- Openly discuss ethics issues.
- Integrate ethics in decision-making.
- Refer employees to correct resources and advice.
- Reassure employees that it is acceptable to deliver bad news.

All these factors can significantly increase employees' positive perception of their agency's culture. A more conscious executive leadership that endorses ethics programmes and promotes ethical behaviour can also intensify employees' awareness of ethics issues.

The study report with the results is available on the OGE website.* This first study also aims at producing a basis for future comparison of programme improvement.

* The Final Report of the Executive Branch Employee Ethics Survey 2000 is found under the folder "Forms, Publications and Other Ethics Documents" on the OGE's website at *www.usoge.gov/home.html*

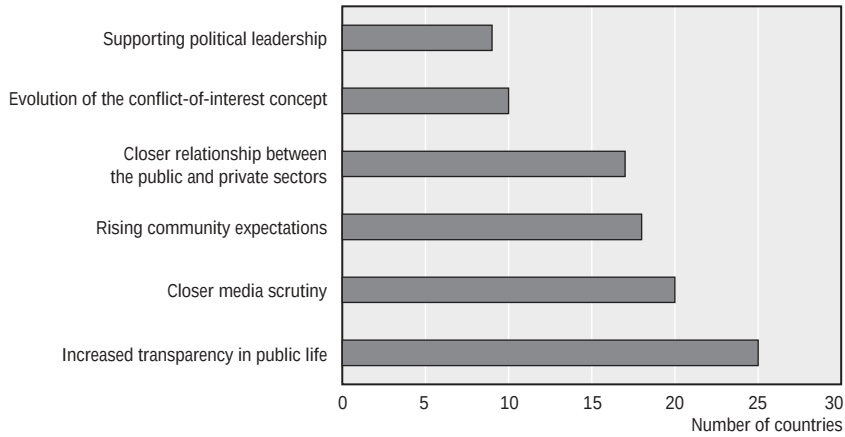
The Government and the Parliament reviewed the *de facto* operation of the conflict-of-interest policy in 2001 in Hungary. Consequently, the Government further strengthened, as part of the government anti-corruption package, the prohibition of influence of economic interests in the decision-making process. Representatives of the public service were involved in the institutional interest reconciliation system, while civil society organisations were consulted in the social dialogue process.

An ongoing governmental review of all potentially corrupt activities in the public service also focuses on possible conflict-of-interest situations in Mexico. The Inter-Ministerial Commission for Transparency and Combating Corruption within the Federal Public Administration[23] was created with the participation of all central government institutions. Horizontal co-operation and social participation are considered to be key factors to review and modernise existing mechanisms.

Major factors across OECD countries that have influenced the conflict-of-interest policy include, on the one hand, rising community expectations, increased transparency in public life and closer public scrutiny by the media and opposition parties, and, on the other hand, the rapidly evolving interaction between the public and private sectors (with more "grey areas" and business-like behaviour of public officials). Supportive political leadership and the evolution of the conflict-of-interest concept (particularly the recognition of new forms of conflicts such as perceived conflicts) are emerging in the OECD area.

Figure 11. **Factors influencing the conflict-of-interest policy in the past decade**

What factors have influenced the conflicts-of-interest policy in the past 5-10 years?



Source: OECD.

Although no single instrument was characterised as the most effective in avoiding conflicts of interest, a combination of mechanisms – especially those that raise awareness and ensure transparency – proved effective in several countries. The annual updating of formal statements on private interests together with training and consultation are key elements in a system which puts greater reliance on the individual public officials to self-disclose their

private interests. On the other hand, in systems which place less reliance on individual integrity arrangements, the updating of legal regulations is the key measure to providing an effective basis for the system. Laws themselves provide a firm framework when they precisely state clear principles and related rules for employees' expected conduct.

The changing socio-economic environment requires the periodic assessment of existing mechanisms so as to ensure that core public sector values are observed and sustained. Maintaining public confidence is particularly important in an environment where deregulation and devolution have created a situation in which citizens' compliance with crucial laws is directly related to their trust in the administration. It is especially important in principal areas of state functioning, such as taxation, licensing, and registrations as well as benefit-administration.

The majority of countries consider the dynamic and interactive socialisation measures effective: importance has been given to awareness raising, guided discussions, consultations and dialogue between employees and managers in order to enable employees to recognise, avoid and resolve conflict of interest as they appear. Another powerful measure, indicated by the responses to the survey, was ensuring the transparency of disclosed personal interests, by making them available for direct or indirect public scrutiny, together with an active and informed media.

At a time when electronic communication is prominent and increasing, the Internet provides quick access to information on the policy – including relevant legal provisions, guiding documents and concrete case studies – that is easily available for both public officials and the public at large. New technology has the potential for both increasing efficiency, by reducing costs and speeding up procedures, and improving policy effectiveness by providing new ways of exercising public scrutiny. In 2000 the introduction of the electronic public financial disclosure forms (FDF) produced significant impacts in Argentina.

Table 1. **The impact of new technology in processing financial disclosure forms: Argentina**

	1999	2000
Level of compliance	67%	98%
Estimated cost per FDF	USD 70	USD 8
Total number of FDF requested in public scrutiny	66	823
Number of FDFs requested in paper form/through Internet	66/–	263/560
Profile of users: press/citizens	43/23	612/211
Conflict-of-interest files opened for examination	40	331

Source: RAIGORODSKY, N. (2002), "Can new technologies be a solution? Conflicts of interest cases in Argentina" (OECD, 2002).

While the new legislation[24] considerably enhanced public requests for access to information on public officials' private interests, it also provided safeguards for privacy regarding sensitive personal information (such as private addresses, information on bank accounts and credit cards). The law established the Anticorruption Office in charge of effectively implementing the new regulations in 2000. The primary function of the Anticorruption Office was to collect financial disclosure forms, process the requested information and detect non-compliance.

The figures above show how the new system increased direct public scrutiny and attained prominent media attention. It also resulted in a significant number of accusations, involving very high-level officials, being presented before the Anticorruption Office. In addition, a survey of the Anticorruption Office revealed improved public opinion. The Office has further improved the effectiveness of the new system and also pays more attention to preventive measures. For example, new software under development would improve the capacity of the Office to analyse the contents of the financial disclosure forms and to crosscheck information with other sources, such as taxation forms, while also respecting the privacy of officials.

Box 19. **Holistic approach to develop an open administrative culture: Finland**

A leading example of a holistic approach to develop an open administrative culture is to be found in Finland. The key elements of the Finnish approach include:

- Measures for promoting awareness – particularly ensuring the clarity of norms, provision of information on the policy and knowledge of its practical application.
- Preventive mechanisms for safeguarding impartiality of civil servants – especially the hearing of parties, the presentation of grounds for a decision and its publicity, clear provisions for disqualification of civil servants in case of actual conflict of interest.
- Retroactive measures – legal protection through administrative self-correction, appeal and petition for review.
- Ensuring transparency of the activities of state administration – decision-making is open and documents are public (with the exception of documents specifically defined as secret or confidential) provides critical conditions for close public scrutiny.

K. Emerging issues and new developments

The areas of activity most likely to produce conflict-of-interest situations, as indicated by the responses to the survey, arise from the increasingly close relationship between the public sector, and the private and non-profit sectors. Some countries explicitly pointed out specific forms for conflict of interest, such as outsourcing (for example in Australia and Ireland) while the privatisation of public services, utilities and enterprises was indicated by a group of countries, including Italy, Mexico, Poland and Turkey.

As the policy measures that deal with the new conflict-of-interest situations are relatively new, in most cases there has been little assessment of their impact. In general, countries are still in the phase of focusing on the development of new forms of regulation and guidance. Increased scrutiny and the critical role of the media are considered to be sufficient. Countries that have reviewed their conflict-of-interest policy in the last half a decade, some have requested follow-up measures. Only very few countries have developed sector agreements with private sector companies to ensure observance of the standards of ethical conduct that employees in private sector organisations are required to maintain. As another example, legislation may be needed to introduce compatible procedures in sensitive fields such as procurement and recruitment (such as requiring the publication of vacant positions and tendering, and auditing the spending provided from public funds) for the private and non-profit sector organisations when public money is used.

An increasing interchange of personnel, ongoing outsourcing, and more transfer of public services away from the traditional public service, are further modifying the public-private sector interface. The widening variety of forms in which public officials may hold private interests, for example innovative financial investment instruments and diverse business involvement, requires countries to upgrade their integrity mechanisms to meet changing conditions and rising public expectations. However, the other sectors can also be partners in these efforts: together with the representatives of businesses, the non-profit community and the employees' associations, governments can work out standards for the most sensitive issues and emerging problems such as ensuring proper disclosure of private interests in lobbying, or determining procedures for whistle-blowing.

The emerging fields of lobbying, political-administrative interface, sponsoring and whistle-blowing

One of the most critical issues is how to provide clear and enforceable standards for lobbying, legitimately influencing public decision-making. Lobbying is at the heart of the interface between the public and private sectors and it is also an integral part of the political system. Although public awareness

has been increased in many OECD countries, very few of them have developed frameworks for providing clear specific standards and procedures in relation to lobbying to guide public officials in this emerging area. In the United Kingdom, in response to the First Report of the Committee on Standards in Public Life, the Cabinet Office developed guidance for civil servants on contact with lobbyists.[25] The guidance re-iterates the basic principles from the *Civil Service Code*, explains the role of lobbyists in the UK political system and provides a list of practical examples. Lobbying is also critical question at the supra-national level and strictly regulated to ensure transparent influencing of decision-making in the European Union.[26] A few European countries, particularly transition countries in Central Europe, have tabled bills on lobbying before the parliament.

In Canada, in line with the principle-based approach, the *Lobbyists Code of Conduct* presents a set of core principles and standards while the *Lobbyist Registration Act* requires the public registration of lobbyist. This registration system introduced in 1997 was the first completely on-line interactive service provided by Industry Canada.[27] In line with the Prime Minister's eight point action plan on ethics in government, outlined in May 2002, a bill was introduced in October 2002 to improve the *Lobbyist Registration Act* by:

- Providing a clearer definition of lobbying.
- Strengthening the enforcement provisions of the *Lobbyist Registration Act*.
- Simplifying registration and strengthening de-registration requirement, with a single filing approach for registration for corporations and non-profit organisations.

In addition to issues arising at the public-private sector interface, conflict-of-interest issues occur at the political-administrative interface. In Norway, for example, a recent Report to the Parliament (*Storting*) addressed specifically the relationship between the administrative and political management of ministries, in addition to the involvement of public officials in the private sector. The report reviewed existing rules, principles and guidelines that applied in Norway as well as other selected countries, and the Parliament sent a set of recommendations to the Government to consider possible restrictions, in particular:

- For those returning to civil service after a political appointment.
- For certain categories of former public officials (especially key personnel with knowledge of sensitive or strategic matters) who take up employment in the private sector.

Growing public concern with regard to sponsoring public agencies by the private sector encouraged a few countries to provide a framework that clarifies the conditions of contribution to public activities from the private sector. In Germany, a new general administrative regulation to promote

activities by the Federal Government through contributions from the private sector (sponsoring, donations and other gifts) provides the federal administration and courts with basic principles and procedures for using sponsoring from the private sector.[28] This regulation also includes a list of examples for activities eligible for sponsorship.

Taking into consideration the experiences of previous whistle-blowing legislations, and particularly the practices learned from the implementation of the UK *Public Interest Disclosure Act* that came into force in July 1999,[29] Korea has developed a fourth generation model to provide frameworks, standards and procedures for whistle-blowing in an Asian context. While the UK model put the emphasis on the protection against reprisals and recognises the role of internal accountability and self-regulations, the recent Korean law emphasises the role of rewards and has established a central agency to administer cases.[30]

Recent developments

Recent developments of the conflict-of-interest policy have shown countries efforts to strengthen their legal frameworks and provide public officials with updated guidelines on the policy. Countries with strict administrative law arrangements established specific conflict-of-interest provisions in recent laws:

- In the Czech Republic, new civil service laws for the central government and the local self-governments require civil servants to disclose their private interests and take reasonable steps to avoid conflict of interest in general. In particularly the law asks civil servants to "refrain from any abuse of information gained in relation to their job for their own or other parties' profit".[31]
- In Hungary, the recently-introduced disclosure policy requires approximately 53 000 public officials and 4 500 public employees to submit their asset declaration forms.[32]
- In Mexico, the new provisions in the public service law describes conflict of interest in general – "when the personal, family or business interests of the public servant may affect the impartial performance of its employment, positions or appointments" and oblige public servants to inform their immediate superior in written form and withdraw from improper involvement where a private interest may be at issue. More specifically the new law proscribes the use of information not available for the public for personal gain, or the benefit of third parties.[33]

Conflict-of-interest issues were also addressed in the *Law on Social Modernisation*, approved in 2002 in France. Specific conflict-of-interest bills have been tabled before the parliament in the Czech Republic (in the form of a private bill), in Italy and Slovakia.

In addition to laws, codes of conduct have become a key instrument for setting standards for avoiding conflict of interest. Several countries introduced new codes or reviewed and updated existing ones. In Korea, a new code of conduct for the public service became effective in May 2003.[34] It lists a wide variety of possible conflicting situations, including preferential treatment and handling improper requests from politicians, and also introduces designated code of conduct officers to help the implementation of the code in government agencies. Based on the framework of this national code of conduct, the Seoul Metropolitan Government has drafted a code of conduct to set strict standards for officials' behaviour, which calls for a variety steps ranging from wage cuts to dismissals for officials who use their positions for personal gain.

Some countries with established frameworks have reviewed their conflict-of-interest policy in light of practice to update their instruments to meet public expectations. In Canada, for example, on 11 June 2002 the Prime Minister announced new guidelines for senior public office holders relating to activities for personal political purposes. The guidelines refer to four specific areas that offer a potential conflict between a minister's public duties and his or her private political interests in a leadership campaign:

- Individuals working on the campaign at the same time as they are working on contracts with the minister's department.
- Lobbyists registered as lobbying the minister's department while working on his or her campaign.
- Operations of the ministerial office.
- Fundraising.

In addition, for public servants the *Values and Ethics Code for the Public Service* was re-issued in June 2003 to take effect on 1 September 2003. The Code updated the conflict-of-interest and post-employment measures to clarify public servants' duties to prevent and avoid conflict of interest. Similarly, in Australia, the *Guidelines on Official Conduct of Commonwealth Public Servants*[35] the principal source of guidance about conflict of interest and conduct issues has been under revision. The *APS Values and Code of Conduct in Practice: A Guide to Official Conduct for APS Employees and Agency Heads* was published in 2003.

Considering the effect of existing disclosure policy, some countries expand the scope of their disclosure systems. In New Zealand, for example, the Government is pursuing expanding the ministerial conflicts of interest register from Ministers of the Crown to all members of Parliament. In May 2002, the Government announced the introduction of a register of interests for members of Parliament. Members of Parliament would be required to complete returns of listed interests following elections and annually thereafter. All returns would be compiled, presented to Parliament and published. Non-compliance would be dealt with primarily by way of publicity and political pressure.

In Poland, rigorous public disclosure requirements came to effect for the first time for public servants in the beginning of 2003 as part of the Government's effort to curb corruption and nepotism. The required personal information includes tax returns that are matched with asset declarations: any discrepancy produces criminal liability. Officials must also reveal all personal business activity or that conducted by family members. This particularly applies to commercial ventures that are viewed as a potential conflict of interest with public affairs. Collected data is accessible to the public at local government offices, or on the Internet. Officials who fail to comply with the new policy will incur financial penalties and can even be removed from office.

The United States, with over two decades of experience with a detailed public disclosure programme at the federal level, is beginning a review of its financial disclosure policy. To that end, the Office of Government Ethics sent a legislative proposal to the Congress in July 2003 which contains recommendations that would streamline and simplify public financial disclosure requirements for officials of all three branches of the Federal Government.[36] That proposal could be taken up and discussed by Congress at any time before the end of the 108th Congress which will conclude in the fall of 2004.

While national governments focus their attention on public organisations at the national level, there is a growing recognition that they also have a role to provide a framework for dealing with conflict-of-interest issues effectively at the sub-national level. To support decision-makers with comparative information on country experiences, a project has reviewed conflict-of-interest regulations at local governments in Central Eastern European countries.[37] The resulting report provides comparative information on legal frameworks and actual practices at the municipal level in six countries.

Countries face an emerging need to provide practical instruments for public officials that help understand the requirements of the conflict-of-interest policy. In response to this need, the New Zealand State Services Commission developed a new resource kit to enable public servant to avoid conflict of interest where possible, and manage them where not. The resource kit *Walking the Line: Managing Conflicts of Interest*[38] consist of the New Zealand *Public Service Code of Conduct*, the video *Walking the Line*, a set of stories, sample session plans and references to other background material.

Notes

1. The *Ministerial Code: A Code of Conduct and Guidance on Procedures for Ministers* reissued in July 2001 can be viewed at *www.cabinet-office.gov.uk/central/2001/mcode/contents.htm*
2. The full text of the model contract can be consulted on the website of the Cabinet Office at *www.cabinet-office.gov.uk/central/2001/modconspads.htm*

3. The guidelines were updated in 2001 in the *Statement of Procurement Good Practices*.

4. The publication of Ethical Principles for Judges, endorsed by the Canadian Judicial Council, consists of a dedicated section on conflict of interest, that can be seen at *http://strategis.ic.gc.ca/pics/oe/epjudg_e.pdf*

5. The text of this Executive Order together with other relevant laws and regulations can be consulted on the official website of the US OGE at *www.usoge.gov/pages/laws_regs_fedreg_stats/exec_orders.html*

6. For example Circular 16/36 on Outside Occupations and Circular 50/29 on Civil Servants and Government Contracts.

7. For instance Circular 2001/2 on requirements for employees seeking to contest a federal, state or territory election and Circular 1999/6 on the use of frequent flyer points specifically in relation to agreement making arrangements in the Australian Public Service *www.apsc.gov.au/circulars/index.html*

8. The *Cabinet Handbook* provides guidance for Ministers on ethics in general, and conflict-of-interest issues in more specific. The full text of the Cabinet Handbook can be consulted on the website at *www.taoiseach.gov.ie/upload/publications/233.pdf*

9. This memorandum together with other guiding documents, opinions and court cases can be seen on the US OGE's website at *www.usoge.gov/pages/laws_regs_fedreg_stats/other_ethics_guidance.html*

10. Namely the *Limitation on Conducting Business Activity by Persons Performing Public Functions Act* of 1997.

11. Act No. 238/1992 on Several Measures Connected with Protection of the Public Interest and Incompatibility of Functions as amended.

12. The full text of the Scotland Act 1998 (Transitory and Transitional Provisions) (members' Interests) Order 1999 can be seen at *www.hmso.gov.uk/si/si1999/19991350.htm*

13. The Register of Interests of Members of the Scottish Parliament can be consulted on the Internet at *www.scottish.parliament.uk/msps/register/index.htm*. This website brings together information on the background biography, contact details, and parliamentary activities – such as membership of committees, posts held – of MSPs and their declarable private interests.

14. The Code of Conduct was agreed by the Scottish Parliament on 24 February 2000, its text can be viewed at *www.scottish.parliament.uk/msps/coc/coc.pdf*

15. Sections on honesty and disclosure of interests are in Chapter 14 of the *Local Government Act* 1993, Australia.

16. All publications are available on the OGE's website at *www.usoge.gov/home.html*

17. *Walking the Talk: Making Values Real*, this resource kit was developed by the State Services Commission to support structured discussion among public servants about values and how they apply these to everyday situations. The resource kit, updated in July 2002, is also available on the website at *www.ssc.govt.nz/display/document.asp?docid=2101&NavID=13* .

18. The revised edition was published in September 2001.

19. The *Guide on the Application of the Conflict of Interest and Post-Employment Code for the Public Service* can be viewed on the website of the Office of Values and Ethics of the Treasury Board of Canada Secretariat at *www.tbs-sct.gc.ca/pubs_pol/hrpubs/tb_851/guide_cip1_e.asp*

20. The publication of Ethical Principles for Judges was approved by the Canadian Judicial Council in September 1998. The document can be consulted at *http://strategis.ic.gc.ca/pics/oe/epjudg_e.pdf*

21. The Report of the Ethics Counsellor is also available on the website at *http://strategis.ic.gc.ca/SSG/oe01244e.html*

22. When the OGE published the proposed executive branch standards of ethical conduct, it received 1068 comments.

23. Comisión Intersecretarial para la Transparencia y el Combate a la Corrupción en la Administración Pùblica Federal.

24. Law 25.188 enacted in 1999 with its Decree No. 41/99.

25. The *Guidance for Civil Servants on Contact with Lobbyists* can be viewed in the website of the Cabinet Office at *www.cabinet-office.gov.uk/central/1999/lobbyists.htm*

26. Information on the accreditation process and the list of lobbyists accredited to the European Parliament can be seen at *www2.europarl.eu.int/lobby/lobby.jsp?lng=en*

27. 98% of registrations were made electronically in 2002, more information on the act, code and public registry can be found at *www.strategis.gc.ca/lobbyist*

28. The regulation was signed by the Federal Chancellor on 7 July 2003 and entered into force on 11 July 2003.

29. Provisions of the act are incorporated in the *Civil Service Guidance*, they can be viewed at *www.cabinet-office.gov.uk/guidance/two/19.htm*, further information on procedures and practical help are provided by the Public Concern at Work, see *www.pcaw.co.uk*

30. The Korea Independent Commission Against Corruption (KICAC) was established in January 2002 to plan and co-ordinate the national measures against corruption. KICAC also directly administers the whistle-blowing law, more information on KICAC activities in English can be accessible at *www.kicac.go.kr*

31. Namely Section 61 of Act No. 218/2002 of 28th May 2002 on *Service of State Employees in Administrative Offices and on Remuneration of those Employees and Other Employees in Administrative Offices and Section*; and Section 16 (1) h) of Act 312/2002 of 13 July 2002 *on Officials of Territorial Self-Government*.

32. The provisions of this disclosure policy in the Civil Service Act was approved by the Parliament in June 2001. The closing date for completion of the first declaration forms was end October 2001.

33. The new provisions are in Articles 8 and 9 of the *Federal Law on the Administrative Responsibilities of Public Servants*. They were published in the Official Gazette on 13 March 2002 and can also be viewed on the website at *www.funcionpublica.gob.mx/leyes/leyresp/ts_capI.html*

34. The *Code of Conduct for Maintaining the Integrity of Public Officials* was enacted in Presidential Decree No. 17906 on 18 Feb 2003. The text of the Code can be consulted on the website of the Korea Independent Commission Against Corruption under KICAC news No. 28 at *www.kicac.go.kr*

35. The *Guidelines on Official Conduct of Commonwealth Public Servants* was issued by the Australian Public Service and Merit Protection Commission in 1995. The new Guide is available on the website of the Australian Public Service Commission at: *www.apsc.gov.au/values/conductguidelines1.htm*

36. The Office of Government Ethics submitted the proposal to amend the *Ethics in Government Act* of 1978 (5 USC. App.) in July 2003. The text can be view in the website of OGE at *www.usoge.gov/home.html*

37. The joint LGI /DfID project on "Local Government Policy Partnership" covers Bulgaria, Latvia, Poland, Romania, Russia and Slovakia. Information on the project and the resulting report can be seen at *http://lgi.osi.hu/lgpp/*

38. The resource kit, issued in June 2003, can be consulted in the website of the State Services Commission at *www.ssc.govt.nz/display/document.asp?docid=3267*

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PART III

The Experiences of OECD Countries

Part III presents selected country case studies on preventing and managing conflict of interest. *These case studies provide more details on actual policy and practice, including the policy approaches countries used, the key elements of legal and institutional frameworks and how the policy is implemented in the particular national contexts in Australia, Canada, France, Germany, New Zealand, Poland, Portugal and the United States.*

MANAGING CONFLICT OF INTEREST IN THE PUBLIC SERVICE – ISBN 92-64-10489-5 – © OECD 2003

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Managing Conflict of Interest in the Public Service
OECD Guidelines and Overview

A Principle-based Approach in Devolved Management: The Australian Experience

by

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Public Service Commissioner, Australia

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Senior Policy Adviser, Australian Public Service Commission

A. The Australian Public Service Values and Code of Conduct

The *Public Service Act 1999* (the PS Act) embeds into the Australian Public Service's governing legislation a set of *Australian Public Service (APS) Values* and an *APS Code of Conduct*.[1] The *APS Code of Conduct* includes an explicit requirement relating to conflicts of interest. The Code requires that:

> *An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.*

There is a requirement for both real and apparent conflicts to be dealt with, on the basis that perceived conflicts can be just as damaging as a real conflict to public confidence in the integrity of the APS.

Principles-based approach

The approach to managing conflict of interest in the APS is one of promoting ethical conduct, mainly by means of the *APS Values and Code of Conduct*, rather than legislating detailed rules for compliance. In addition to the explicit requirement in the Code of Conduct referred to above, there are several other elements of both the Values and the Code that are of particular relevance to the management of conflicts of interest. These are set out below.

Relevant aspects of the APS Values and Code of Conduct

The *APS Values* provide, *inter alia*, that:

- The APS is apolitical, performing its functions in an impartial and professional manner.
- The APS has the highest ethical standards.

The *APS Code of Conduct* stipulates, *inter alia*, that:

- An APS employee must behave with honesty and integrity in the course of APS employment.
- An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.
- An APS employee must not make improper use of inside information, or the employee's duties, status, power or authority, in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.

The Bowen Code

Many of the practices and procedures used in Australia are based on policy guidance developed 25 years ago. In 1977, a Committee of Inquiry, chaired by Sir Nigel Bowen, K.B.E., was established by the Commonwealth Government to examine the issue of conflicts between public duty and private interests. The Government of the day endorsed the principles contained in the Code of Conduct proposed by the Committee (which became known as the "Bowen Code"), for its application to Ministers of State and their staff, members of the Defence forces, public servants and Statutory Office-Holders.

It remains the responsibility of Agency Heads to advise Statutory Office Holders within their portfolios of their obligations in relation to these principles. The Prime Minister also issues guidance to Ministers which is based substantially on the Bowen Code.[2]

Responsibilities of Agency Heads

The Australian Public Service operates in a devolved management environment. The PS Act gives the Heads of individual APS Departments and Agencies "all the rights, duties and powers of an employer in respect of APS employees in the Agency". Agency Heads are required by the Act not only to uphold but also to promote the APS Values, and to ensure compliance with the Code of Conduct. Consistent with this, it is their responsibility to put in place corporate governance arrangements in their Agencies that ensure that their employees understand and abide by their obligations in terms of ethical behaviour, including the disclosure and management of conflicts of interest.

Agency Heads, in their own case, must declare to their Minister any personal involvement in a situation where there is actual or potential conflict of interests.

Responsibilities of APS employees

All APS employees are required to uphold the Values and comply with the Code of Conduct. As mentioned above, the Code requires all APS employees to disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with their APS employment (Section 13(7), PS Act).

There are three major classification groupings within the APS, which can be broadly characterised as administrative staff (APS levels 1-6), middle management (Executive Levels 1 and 2), and senior management (Senior Executive Service, Bands 1-3). The Senior Executive Service (SES) is established under Section 35 of the PS Act to provide a group of employees who are professionally expert and/or have highly developed managerial and policy-making skills. By virtue of the positions of influence they occupy within

Agencies, SES employees have an additional obligation under the Act, by personal example, to promote the Values and compliance with the Code [Section 35(2)(c)].

Declarations of interests

Also, because at the highest levels of management the potential for conflict of interest is greater, SES employees have an obligation to disclose, in writing to their Agency Head, details of their personal and financial interests, with a view to identifying potential areas for conflicts. All SES employees and above, as well as those acting in SES positions for more than three months, must provide written statements of their private interests and those of their immediate family, updated on an annual basis. Statements are confidential to the Agency Head and are not disclosed to the public. They include a written acknowledgement that family members to whom the personal information relates have been advised of its collection and possible disclosure. There is no requirement to specify monetary values. While the focus of such statements is largely on financial interests, employees are advised to be aware of the need to disclose any private interests, such as social or cultural activities, or other personal relationships that may be in conflict with their official duties.

Agencies generally have pro forma statements prepared for employees to register their interests, which cover the following matters:

- Real estate.
- Shareholdings.
- Trusts or nominee companies.
- Directorships in companies.
- Partnerships.
- Other investments.
- Other assets.
- Other substantial sources of income.
- Gifts, sponsored travel and hospitality.
- Liabilities.

Usually, statements prepared by Agency Heads are provided to the Minister, and statements by SES staff are provided to the Agency Head. If an Agency Head's statement discloses a conflict of interests, the relevant Minister and Agency Head must take measures to resolve the conflict. Where an APS employee's statement discloses a conflict of interests, the individual and Agency Head must take steps to resolve the conflict.

B. Role of the Australian Public Service Commission

The first two functions of the Public Service Commissioner under the Public Service Act are to evaluate the extent to which Agencies incorporate and uphold the Values and to evaluate the adequacy of systems and procedures in Agencies for ensuring compliance with the Code. The Public Service Commissioner provides an annual State of the Service Report which is tabled in the Parliament. The APS Commission also issues guidelines and good practice advices, to assist Agency Heads and individual employees to carry out their responsibilities in upholding the APS Values and complying with the Code of Conduct.

The principal source of guidance about conflict of interest, and conduct issues more generally, is the *APS Values and Code of Conduct in Practice: A Guide to Official Conduct for APS Employees and Agency Heads (2003).*[3]

Without being prescriptive about how Agency Heads manage conflict-of-interest situations within their Agencies, the Guide highlights particular areas of sensitivity that managers and employees need to be aware of. They provide guidance on ways to avoid conflicts of interest. The Guide notes, however, that avoidance is not always possible and that there are circumstances where conflicts must be managed appropriately.

Particular areas of sensitivity

In carrying out their duties, APS employees must not allow themselves to be improperly influenced by family or personal relationships, and if a situation arises where a decision has to be made and that decision would directly affect a person who has a relationship with the decision-maker, they should declare the conflict and refer the matter to their manager for a decision, based on the merits of the case. If couples or other family members work together in the same Agency, the Guide suggests that it is inappropriate for one to have any line responsibility over another.

Employees serving on Boards and Committees are another area of sensitivity dealt with in the Guide. Employees serving on Boards often do so as a direct result of their responsibilities within their Agency, and this may to some extent involve inherent conflicts of interest that need to be managed, rather than avoided completely. Departments and Boards are advised to have in place a structured process to deal with such situations. This might involve, for example, the employee absenting him or herself from certain discussions and decisions. It is suggested that potential conflicts are declared and openly discussed by the members of the Board, but that, if the Board cannot resolve the issue satisfactorily, it may be necessary to raise the matter with the relevant Minister.

The potential also exists for conflict of interest in committees established by Agencies, particularly where a Minister appoints the chair and/or members and the committee has a significant influence on decision making. In these situations, Agencies are similarly advised to have in place procedures for alerting committee members to the need to identify and avoid any conflict of interests, for example by requiring members to provide a written declaration of interests that may relate to any activity of the committee, and to make conflict of interest a standing agenda item for all committee meetings.

Acceptance of gifts

The Guide reminds Agencies that their policies on the acceptance of gifts by employees should be premised on the risk that accepting gifts or benefits such as hospitality may allow a conflict of interest, or at least the perception of a conflict of interest, to develop. In extreme cases, gifts or benefits may be determined to be bribes, the acceptance of which is an offence under Australian criminal law, as well as a breach of the APS Code of Conduct.

As mentioned, the Guide is not prescriptive and Agency Heads may apply specific rules and detailed guidance to their staff. The Public Service Commissioner has also cautioned against zealotry, noting that APS employees are bound by all the Values, including focusing on achieving results and managing performance, and that acceptance of hospitality, in particular, may be consistent with promoting constructive working relations without conflicting with ethical obligations.

The Guide suggests it may be useful for employees who are offered a gift to consider how they would answer questions from a Parliamentary Committee, and if that would result in any embarrassment, then perhaps the perception of conflict of interest is such that the gift should not be accepted. The Guide suggests there may be circumstances where the acceptance of even minor benefits could be construed as undermining public confidence in the impartiality of the public servants concerned. For example, when a tender process is underway, or when public servants are administering regulations directly affecting the individuals or organisations concerned.

Agencies are urged to continue to require recipients of gifts and benefits to register them and their approximate value, particularly where that value is significant, but cautioning that even token gifts carrying the name or logo of a sponsor can in some circumstances give the appearance of a conflict of interest. It is recommended that policies also apply to the family of the employee, where there is an impact on the employee's official duties.

Agencies are encouraged to communicate their policies to organisations with which they deal and with potential suppliers and contractors, highlighting that inducements of any kind are unacceptable.

Exploiting information or position

In addition to the requirement relating to conflict of interest, the Code of Conduct prohibits APS employees from making improper use of official information in order to gain, or seek to gain, a benefit or advantage for themselves or for any other person. They must not, for example, speculate in shares on the basis of information to which they have had access in the course of their duties.

Post-separation employment

The potential for conflict of interest where APS employees, particularly those in very senior positions, are considering taking up employment with private sector organisations after leaving the APS is covered in the Guide. It stresses that, while mobility between the public and private sectors is important, and the ensuing transfer of skills and experience should not be discouraged, there are areas of caution when APS employees are leaving to take up employment in fields that are closely aligned to their responsibilities within an agency.

Agencies are advised to have in place guidance on post-separation employment that makes it possible for all parties (the agency, the transferring employee and the new employer) to demonstrate that ethical considerations have been explicitly considered and that the interests of all the parties are therefore protected in the event of any future audit, parliamentary or media scrutiny. Such arrangements may include, by agreement, "cooling off" periods, during which the transferring employee is restricted in his or her activities, while the employee is still with the APS, it is the legal responsibility of the employee, and the Agency Head, to ensure potential or real conflicts of interest are resolved (including by way of a temporary change of duties, or leave, pending separation).

The Guide provides quite detailed advice on the types of issues that should be taken into account by Agencies when developing their policies on post-separation employment, particularly in relation to employees who are contemplating taking up a business appointment, or who are involved in market testing and outsourcing processes.[4]

Legal restrictions

In general, there are no provisions in the PS Act, the regulations, or any other Australian legislation that restrict the type of employment that may be undertaken by former APS employees after they retire or resign from the APS. Thus there are no statutory "cooling off" periods either for public servants or for Ministers restricting their employment after leaving public office. There are, however, certain legal restrictions on the use and disclosure of information after

leaving the APS, on the re-employment of people who have left the service, if they have received a redundancy benefit and on the employment by contractors of someone who was a key decision-maker in a tendering process.

Employees who have received a redundancy benefit

With some limited exceptions, the Public Service Commissioner's Directions prevent former employees from returning to the APS as ongoing employees within twelve months of accepting voluntary retrenchment from the APS.

Breach of confidence

Although in common law there is a general rule that a person is not to be restrained from using skill, knowledge or experience gained in the course of employment ("restraint of trade"), an exception to this general rule is the doctrine of breach of confidence which protects information of a confidential nature imparted to an employee in circumstances where an obligation of confidence is imposed.

Intellectual property

Under common law, any work performed by an employee for an employer is the property of the employer. Because the Commonwealth Agency is the employer of an APS employee, any work performed by an employee for the Agency is, and remains, the intellectual property of the Commonwealth.

Disclosure of information

There are legal restrictions on the disclosure of official information after leaving Australian Public Service employment.[5]

Key decision-makers in an outsourcing tender process

The APS Commission has promulgated advice to Agencies that, under some circumstances, provision may be included in contracts restricting the successful tenderer from employing people who were key decision-makers in the tender process, both during the tender process and for a period after its completion. Commonly, that period of exclusion is six months. A similar provision is suggested for inclusion in the request for tender, which precludes the solicitation, enticement or engagement of key Agency employees during this process.

C. Application of the measures to manage conflicts of interest

It is the responsibility of Agency Heads to ensure that the measures to manage conflicts of interest are applied effectively in their agencies. This means not only those employees (including SES staff in relation to the

Declaration of Interests) are made aware of their responsibilities to disclose and take reasonable steps to avoid conflicts of interest, but also that procedures are in place to deal with situations where it appears that individuals have not met their responsibilities.

Managing conflicts of interest has become a more pervasive issue with the wider application of outsourcing and partnering, increased commercialisation and purchaser-provider arrangements and with increasing awareness of the financial (and other) impact of Government regulation. Agency Heads have been reviewing their procedures, consistent with the PS Act and APS Commission guidance. An example of a Chief Executive Instruction from the Secretary of the Department of Health and Ageing,[6] which addresses, in particular, the challenges for internal and external Committees.

Any conduct by an APS employee that does not comply with the Code of Conduct may be found to be in breach of the Code. If a breach is determined, there is a range of sanctions available under the Public Service Act, as follows:

- Termination of employment.
- Reduction in classification.
- Re-assignment of duties.
- Reduction in salary.
- Deductions from salary, by way of fine.
- Reprimand.

The decision to impose a sanction on an employee who is found to have breached the Code of Conduct may be reviewed by the Merit Protection Commissioner, except where the sanction is termination of employment. In that case, the employee may seek a remedy from the Australian Industrial Relations Commission, under the unfair dismissal provisions of the *Workplace Relations Act 1996*.

Notes

1. The Values and the Code are set out in Sections 10 and 13 of the Act, respectively, they can be seen in Annex 1 and 2 of this chapter.
2. The Bowen Code is reproduced in Annex 3 of this chapter.
3. The Guide is available on the website of the Australian Public Service Commission at: *www.apsc.gov.au/values/conductguidelines1.htm*
4. The principles and procedures are set out in Annex 4 for business appointments and for market testing and outsourcing in Annex 5.
5. The relevant sections of the *Crimes Act 1914* and the *Criminal Code Act 1995* are in Annex 6.
6. The Instruction is in Annex 7.

ANNEX 1

Australian Public Service Values

Section 10(1) of the *Public Service Act 1999* provides that:

1. The APS is apolitical, performing its functions in an impartial and professional manner.
2. The APS is a public service in which employment decisions are based on merit.
3. The APS provides a workplace that is free from discrimination and recognises and utilises the diversity of the Australian community it serves.
4. The APS has the highest ethical standards.
5. The APS is openly accountable for its actions, within the framework of Ministerial responsibilities to the Government, the Parliament and the Australian public.
6. The APS is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programmes.
7. The APS delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public.
8. The APS has leadership of the highest quality.
9. The APS establishes workplace relations that value communication, consultation, co-operation and input from employees on matters that affect their workplace.
10. The APS provides a fair, flexible, safe and rewarding workplace.
11. The APS focuses on achieving results and managing performance.
12. The APS promote equity in employment.
13. The APS provides a reasonable opportunity to all eligible members of the community to apply for APS employment.

14. The APS is a career-based service to enhance the effectiveness and cohesion of Australia's democratic system of government; and
15. The APS provides a fair system of review of decisions taken in respect to APS employees.

ANNEX 2

Australian Public Service Code of Conduct

Section 13 of the Public Service Act 1999 provides that:

1. An APS employee must behave honestly and with integrity in the course of APS employment.
2. An APS employee must act with care and diligence in the course of APS employment.
3. An APS employee, when acting in the course of APS employment, must treat everyone with respect and courtesy, and without harassment.
4. An APS employee, when acting in the course of APS employment, must comply with all applicable Australian laws.*
5. An APS employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction.
6. An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.
7. An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.
8. An APS employee must use Commonwealth resources in a paper manner.
9. An APS employee must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment.
10. An APS employee must not make improper use of:

    a) inside information; or

    b) the employee's duties, status, power or authority in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.

* For this purpose, Australian law means:
a) any Act (including this Act), or any instrument made under an Act; or
b) any law of a State or Territory, including any instrument made under such a law.

11. An APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS.
12. An APS employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia.
13. An APS employee must comply with any other conduct requirement that is prescribed by the regulations.

ANNEX 3

The Bowen Code

The Code of Conduct proposed by the Report of the Committee of Inquiry Concerning Public Duty and Private Interest (the Bowen Report) provides the following principles for the avoidance and resolution of conflicts of interest:

- An officeholder should perform the duties of his office impartially, uninfluenced by fear or favour.
- An officeholder should be frank and honest in official dealings with colleagues.
- An officeholder should avoid situations in which his private interest, whether pecuniary or otherwise, conflicts or might reasonably be thought to conflict with his public duty.
- When an officeholder possesses, directly or indirectly, an interest which conflicts or might reasonably be thought to conflict with his public duty, or improperly to influence his conduct in the discharge of his responsibilities in respect of some matter with which he is concerned, he should disclose that interest according to the prescribed procedures. Should circumstances change after an initial disclosure has been made, so that new or additional facts become material, the officeholder should disclose the further information.
- When the interests of members of his immediate family are involved, the officeholder should disclose those interests, to the extent that they are known to him.
- When an officeholder (other than a member of Parliament) possesses an interest which conflicts or might reasonably be thought to conflict with the duties of his office and such interest is not prescribed as a qualification for that office, he should forthwith divest himself of that interest, secure his removal from the duties in question, or obtain the authorisation of his superior or colleagues to continue to discharge the duties.
- An officeholder should not use information obtained in the course of official duties to gain directly or indirectly a pecuniary advantage for himself or for any other person.

- An officeholder should not:
  - ❖ Solicit or accept from any person any remuneration or benefit for the discharge of the duties of his office over and above the official remuneration.
  - ❖ Solicit or accept any benefit, advantage or promise of future advantage, whether for himself, his immediate family or any business concern or trust with which he is associated from persons who are in, or seek to be in, any contractual or special relationship with government.
  - ❖ Except as may be permitted under the rules applicable to his office, accept any gift, hospitality or concessional travel offered in connection with the discharge of the duties of his office.
- An officeholder should be scrupulous in his use of public property and services, and should not permit their misuse by other persons.
- An officeholder should not allow the pursuit of his private interest to interfere with the proper discharge of his public duties.

ANNEX 4

Principles and Procedures for Business Appointments

Acceptance of business appointments

As a general principle, mobility between the public and private sectors should not be unduly restricted. It is important, however, that where an APS employee intends to take up a business appointment following resignation or retirement from the APS, all reasonable steps are taken to avoid conflict of interests that may arise while the APS employee is still employed by the Commonwealth. In addition, Agencies should look to protect the integrity of the APS by encouraging the employee and the new employer to accept their common interest in managing real and perceived conflicts of interest.

Identifying conflict of interest

Where an APS employee is intending to take up a business appointment after leaving the APS, conflict of interests are most likely to arise where his or her work involves:

- Commonwealth purchasing functions.
- The preliminary stages of procurement – identification and definition of a requirement – especially when the capability of suppliers is closely connected with a specification.
- Anticipated, or actual, contractual relationships between the Commonwealth and the proposed employer.
- The exercise of discretion in conferring some advantage on the proposed employer, *i.e.* a licence or concession, including a subsidy or tariff or other regulatory advantage.
- Knowledge of confidential procedures and criteria used within an Agency which could allow anticipation or manipulation of Agency decisions.

- Knowledge of government intentions that could confer direct financial advantage on those able to participate.

Similarly, an appointment with a business or a body falling into any of the following categories could raise immediate issues of conflict of interests:

- Those in, or anticipating, contractual relationships with the Commonwealth.
- Those in which the Commonwealth is a shareholder.
- Those in receipt of Commonwealth loans, guarantees or other forms of capital assistance.
- Those with which the APS employee's Agency is otherwise in a special or close working relationship, for instance in regard to regulation, policy formulation or decision making.
- Those whose primary purpose is to lobby Ministers, members of Parliament, or Agencies.

Procedures where an individual employee is offered a business appointment

Where an APS employee:

a) whose duties fall into any of the categories outlined above, or any other area where conflict of interest could arise, has been offered a business appointment, or

b) has been made an offer of employment by a business or body falling into one the categories outlined immediately above,

The APS employee should inform the Agency Head in writing. This notification should outline any relationship between the APS employee's official duties and the proposed appointment, and should describe any possible conflict of interests perceived by the APS employee.

The Agency Head, having regard to:

- The importance and sensitivity of the position held by the APS employee.
- The nature of the business appointment and its relationship to the APS employee's work.
- The relationship of the proposed employer and the Commonwealth, *e.g.* If the proposed employer is a regular supplier of services or equipment to the Commonwealth or could benefit from knowledge of government policy intentions.
- The period during which information gained or contacts made would continue to be of value to the APS employee and his or her new employer.

Should discuss with the APS employee the steps that are to be taken to avoid any conflict of interests. These steps may include re-allocation of the

APS employee's duties to other staff, a temporary movement to a different work area, taking leave before exiting the APS, and, in the event of any perceived difficulty in the relationship of the new employer with the former employer, determining the action to be taken to resolve that difficulty.

An Agency Head contemplating or offered a business appointment should follow the same procedures, notifying the Secretary of the Department of the Prime Minister and Cabinet of his or her intentions.

A statutory officer contemplating or offered a business appointment, whether during or at the end of the period of appointment, should follow similar procedures, notifying the portfolio Agency Head (or Minister) of his or her intentions.

ANNEX 5

Procedures to Deal with Conflict of Interest in Market Testing and Outsourcing Situations

Agencies contemplating outsourcing a function or service should develop and promulgate guidance and directions to assist staff in affected areas to deal with any conflict-of-interest situations that may arise. APS employees working in an area affected by market testing and outsourcing may, for example, experience conflicts between their interest in securing alternative work and the expectation of their Agency that they work diligently to expedite the market testing or outsourcing process.

The following points cover some of the issues likely to be encountered in a workplace subject to testing and outsourcing. They are not intended to be exhaustive, or to cover all situations. APS employees should familiarise themselves with any relevant directions or instructions issued by their Agency.

- While it is appropriate for individual APS employees to approach a successful tenderer and indicate an interest in obtaining employment, they must be careful not to divulge commercially sensitive information. The information provided to the tenderer should be limited to the APS employee's skills, competencies, training and personal attributes. Current working arrangements should not be discussed.
- An APS employee who is offered a position should inform their Agency in writing.
- APS employees may attend public meetings held out of normal working hours, convened by a tenderer seeking expressions of interest from Agency personnel to accept employment should that tenderer be successful.
- It would not be acceptable for an APS employee to solicit employment of other APS employees on behalf of a tenderer or a contractor for a market testing or outsourcing proposal.

- It would be desirable for probity reasons to exclude APS employees from occupying positions to be outsourced from tender evaluation and negotiation processes. Where the specialist knowledge and experience of these APS employees is required in order to evaluate tenders fully, care must be taken to limit their role to those areas where their involvement is essential. Any input by them should be subject to peer or management review and should be required for specific issues only on an "as needed" basis.
- External independent probity auditors should assess the evaluation and decision-making process.
- APS employees must not solicit gifts, favours, or other benefits from tenderers or contractors of a market testing or outsourcing proposal.
- It would not be acceptable for an APS employee to show favouritism towards former APS employees who are working for tenderers or contractors for the market testing or outsourcing proposal.
- It would be inappropriate for individual APS employees to provide a tenderer for a market testing or outsourcing proposal with information or records, such as reports, technical manuals or instructions. Requests for information should be referred to the person assigned by the Agency to co-ordinate the outsourcing project.
- Where an "In-House" bid is made, staff who are members of an "In-House Option team" should, before indicating their interest in employment to a tenderer, seek approval from their Agency.
- Information concerning an In-House Option should be treated as privileged, commercial-in-confidence information.

ANNEX 6

Criminal Provisions

The Crimes Act

Section 70 (2) of the *Crimes Act 1914* provides that:

- A person who, having been a Commonwealth officer, publishes or communicates, without lawful authority or excuse (proof whereof shall lie upon him), any fact or document which came to his knowledge, or into his possession, by virtue of having been a Commonwealth officer, and which, at the time when he ceased to be a Commonwealth officer, it was his duty not to disclose, shall be guilty of an offence.
- The penalty for a breach of s. 70 (2) is imprisonment for two years.

The Criminal Code

Section 142.2 of the Criminal Code (contained in the Criminal Code Act 1995), provides that:

1. (2) A person is guilty of an offence if:

   a) the person has ceased to be a Commonwealth public official in a particular capacity; and

   b) the person uses any information that the person obtained in that capacity as a Commonwealth public official; and

   c) the person does so with the intention of:

      i. dishonestly obtaining a benefit for himself of herself or for another person; or

      ii. dishonestly causing detriment to another person.

2. (3) Paragraph (2) applies to a cessation by a person:

   a) whether or not the person continues to be a Commonwealth public official in some other capacity; and

b) whether the cessation occurred before, at or after the commencement of this section.

The maximum penalty that may be imposed for a breach of this provision is imprisonment for 5 years.

ANNEX 7

Department of Health and Ageing Policy on Managing Conflict of Interest in Committees

External committees

1. The Department has a large number of committees. Some comprise a chair and/or members appointed by the Minister. The way conflict of interest should be managed will vary according to the nature of the committee, the method by which the members have been selected or appointed, and the extent to which the committee is influencing decision making, compared with receiving information or providing general advice. Described in the next few paragraphs is a rigorous model which should be applied where the committee is formal, and has significant influence on decision making. However these requirements can be modified as necessary to suit the circumstances of each particular committee.
2. Where the appointment is made by the government, within a month of being appointed, the chair of the committee must give to the Minister, and members of a committee must give to the chair, a written declaration of interests the member has that may relate to any activity of the committee. Other committee chairs should provide similar information to the Secretary.
3. In any situation that may give rise to a conflict of interest or a potential conflict of interest, the member should immediately declare that conflict of interest to the chair of the relevant committee and seek the chair's agreement to retain their position.
4. In assessing the appropriate response where a conflict of interest has arisen, the chair of the committee should take account of both the apparent conflict and of the appearance of conflict. The Department should also be notified of the conflict/potential conflict of interest.

5. If the appearance of conflict is likely to undermine or raise questions about the credibility of the project, the chair should take appropriate action to avoid or minimise that impact. Ideally the person involved should step down from any involvement with that particular project. This would entail not attending meetings when the committee considers the matter or take part in any discussion of the committee in relation to the matter.
6. Where this is not possible because that person is the most suitable, or the only person with that expertise, the chair should look at ways in which any actual or perceived bias can be overcome (*e.g.* seeking referees, declaring the potential interest in documentation relating to the project). The public consultation process may also minimise the impact of any bias or perceived bias.
7. At the appropriate point in a committee's life, secretariats should:
   - Provide a form letter related to acceptance of nomination and certification in respect of declaration of interest to nominating organisations or nominees for completion.
   - Provide a proforma to new committee members for declaring conflict of interest as part of a letter of appointment.
   - Make available to committee members a proforma for declaring conflict of interest which arises during the lifetime of the appointment.
   - Provide a proforma to committee members for annual declaration of interests.
   - Record in the minutes of the meeting a member's disclosure of conflict of interest during a committee meeting.
   - Record in the minutes of the next committee meeting a member's disclosure made to the chair outside of meeting times; and
   - Keep copies of any declarations of interest on file.
8. Conflict of interest should be a standing agenda item for all committee meetings and any supporting committees. At the commencement of each meeting, or as appropriate, the chair should invite members to declare or discuss any relevant matter.
9. Each committee's approach to conflict of interest should be reviewed regularly to ensure that it maintains currency with legal and departmental requirements.
10. From time to time the Department may need to create time-limited committees, or enter into negotiation with external parties in order to reach agreements. For such committees or negotiations, there remain personal obligations for the individual to recognise and manage any conflict of interest or the appearance of such conflict.

11. Notwithstanding the personal obligation of each participant, departmental employees are expected to:

- raise and document the issue of potential for conflict of interest, or perceptions of such conflicts;
- determine how the department should respond to any such conflicts;
- report to the minister or secretary as appropriate;
- managers in all forums are expected to remain alert to the possibility of a conflict of interest arising, and to raise it with the committee if it becomes necessary. However the actual method of dealing with a conflict of interest needs to fit the situation.

Internal committees

The above principles apply equally to internal committees in the Department where there are no or few external members. However due to the nature of the committee and the issues discussed, conflicts of interest may arise less frequently.

Nevertheless it is essential that:

- Any conflict of interest disclosed during a committee meeting is recorded in the minutes.
- A conflict of interest disclosed to the chair outside of meeting times is recorded in the minutes of the next committee meeting.
- Copies of any declarations of interest are kept on file.
- If minutes are not generally kept of a committee's proceedings, then the chair of the committee is responsible for documenting in a file note the declaration and subsequent decision on resolving the conflict.

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Managing Conflict of Interest in the Public Service
OECD Guidelines and Overview

Principles and Prevention: Meeting Canadians' Expectations of Ethical Behaviour in Public Life

by

Howard Wilson
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A. Summary

The Government of Canada has developed a framework of codes and guidelines that are rooted in a principle-based approach to achieving high ethical standards. Rather than setting out a long list of rules, Canada's approach has been to establish broad and clear standards based on a set of principles. The goals of this approach are to inspire integrity and achieve transparency by using proactive steps that encourage open, ethical decision-making. The fundamental assumption in this approach is that people choose to take on the demands of public office out of a desire to make a positive contribution, rather than for narrow self-interest.

The *Conflict of Interest and Post-Employment Code for Public Office Holders*[1] (the Conflict-of-Interest Code) and other guidelines are described in general terms in this chapter to provide a context for the more detailed description of the work of the Office of the Ethics Counsellor in the second part of the chapter.

B. Developing a modern framework for ethics issues in the Government of Canada

Approach and objectives

In June 1994, Prime Minister Chrétien issued a new Conflict–of-Interest Code and created the new position of Ethics Counsellor with responsibility for the administration of the Code and the application of compliance measures.

The objective of the Code is to enhance public confidence in the integrity of public office holders and the decision-making process in government. At the same time, the Code seeks to encourage experienced and competent people to seek and accept public office and to facilitate interchange between the private and the public sectors. It establishes clear rules of conduct and post-employment practices to minimise the possibility of conflicts arising between the private interests and public duties of office holders.

The public office holders subject to the Conflict of Interest Code

The Conflict-of-Interest Code applies to all members of the Ministry: the Prime Minister, Ministers, Ministers of State and Secretaries of State. It also applies to Parliamentary Secretaries and all full-time Governor-in-Council

Box 20. **Summary of ethics initiatives between 1973 and 1993 in Canada**

The Government of Canada framework for ethics issues has emerged over almost 30 years of initiatives by Prime Ministers. From its initial base, it has expanded and become more comprehensive as public expectations have risen and as experience has pointed to new areas of attention.

The 1970s

Prime Minister Trudeau issued Conflict-of-Interest Guidelines in December 1973. They consisted essentially of principles that the government applied to Ministers, their political staff (non-public servants) and Governor-in-Council (Cabinet) appointees through internal directives. The government established an Office of the Assistant Deputy Registrar General to administer those guidelines. The Prime Minister extended the guidelines to ambassadors and Parliamentary Secretaries in 1978, and issued post-employment guidelines.

In 1979, Prime Minister Clark issued similar guidelines, and extended their application to Minister's spouses.

The 1980s

In 1983-84, a bi-partisan Task Force on Conflict of Interest (the Starr–Sharp Task Force) undertook a comprehensive review. In May 1984, it issued a report, *Ethical Conduct in the Public Sector*, which proposed a Code of Ethical Conduct.

In September 1985, Prime Minister Mulroney tabled a new *Conflict of Interest and Post-Employment Code for Public Office Holders* in Parliament. This Code was an administrative instrument that applied to all federal office holders, including Ministers, their political staff and Governor-in-Council appointees.

In 1987, the Honourable Justice W. D. Parker reported on his enquiry into allegations of conflict of interest in the affairs of the Minister of Industry that led to changes in the type of assets permitted to be included in a blind trust.

In 1988, Prime Minister Mulroney announced new procedures for the review of appointments, a study of lobbyist registration and parliamentary study on a Code of Conduct for Parliamentarians. Parliament passed the Lobbyists Registration Act in 1989.

(Cabinet) appointees such as deputy ministers of government departments and the heads of agencies, Crown corporations, boards, commissions and tribunals.

Equally, all political staff members of a Minister or Secretary of State are subject to the Code, whether they work in a ministerial office, a Parliament

Hill office or in a constituency. Certain ministerial staff members are subject to the post-employment provisions of the Code while others, to the principles only. Part-time Governor-in-Council appointees are subject to the principles of the Code, but not its compliance measures.

The Code's principles

The Conflict-of-Interest Code sets out ten principles that offer direction and guidance to public office holders. Those principles stress the high standards of conduct and behaviour Canadians expect of those in public office and are set out in the accompanying box.

Box 21. **The Canadian Conflict of Interest and Post-Employment Code for Public Office Holders**

Object – The object of this Code is to enhance public confidence in the integrity of public office holders and the decision-making process in government:

a) while encouraging experienced and competent persons to seek and accept public office;

b) while facilitating interchange between the private and the public sector;

c) by establishing clear rules of conduct respecting conflict of interest for, and post-employment practices applicable to, all public office holders; and

d) by minimizing the possibility of conflicts arising between the private interests and public duties of public office holders and providing for the resolution of such conflicts in the public interest should they arise.

Principles – Every public office holder shall conform to the following principles.

Ethical Standards – Public office holders shall act with honesty and uphold the highest ethical standards so that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced.

Public Scrutiny – Public office holders have an obligation to perform their official duties and arrange their private affairs in a manner that will bear the closest public scrutiny, an obligation that is not fully discharged by simply acting within the law.

Decision-making – Public office holders, in fulfilling their official duties and responsibilities, shall make decisions in the public interest and with regard to the merits of each case.

Box 21. **The Canadian Conflict of Interest and Post-Employment Code for Public Office Holders** *(cont.)*

Private Interests – Public office holders shall not have private interests, other than those permitted pursuant to this Code that would be affected particularly or significantly by government actions in which they participate.

Public Interest – On appointment to office, and thereafter, public office holders shall arrange their private affairs in a manner that will prevent real, potential or apparent conflicts of interest from arising, but if such a conflict does arise between the private interests of a public office holder and the official duties and responsibilities of that public office holder, the conflict shall be resolved in favour of the public interest.

Gifts and Benefits – Public office holders shall not solicit or accept transfers of economic benefit, other than incidental gifts, customary hospitality, or other benefits of nominal value, unless the transfer is pursuant to an enforceable contract of property right of the public office holder.

Preferential Treatment – Public office holders shall not step out of their official roles to assist private entities or persons in their dealings with the government where this would result in preferential treatment to any person.

Inside Information – Public office holders shall not knowingly take advantage of, or benefit from, information that is obtained in the course of their official duties and responsibilities and that is not generally available to the public.

Government Property – Public office holders shall not directly or indirectly use, or allow the use of, government property of any kind, including property leased to the government, for anything other than officially approved activities.

Post-Employment – Public office holders shall not act, after they leave public office, in such a manner as to take improper advantage of their previous office.

The Code's disclosure requirements

The Code stresses prevention and avoidance right from the time of a public office holder's appointment. At the base of the system is the disclosure requirement. This requires office holders to report in confidence to the Ethics Counsellor all of their assets, investments, debts and outside activities, both past and current, as well as the receipt of any gifts, hospitality or other benefits. The disclosure requirements for Ministers, Secretaries of State and Parliamentary Secretaries extend to their spouses and dependent children. Spouses are not themselves subject to the Conflict-of-Interest Code but their

interests and outside activities may require that the Minister refrain from dealing on matters that would directly benefit that spouse's interests.

Exempt assets under the Code

The Code sets out the types of assets that are exempt from compliance measures and that the office holder can continue to hold and personally manage. These are normally assets for the private use of office holders and their families and not of a commercial character. They include a residence, recreational property, household goods and personal effects, government bonds and open-ended mutual funds.

Declarable assets

Certain other assets require a public declaration. Examples are an ownership interest in a private business that has no contracts with the federal government, commercially operated farms and rental property. An office holder may continue to deal with such assets, but must exercise vigilance to prevent conflicts from arising.

Controlled assets

Public office holders may not trade in shares of companies listed on stock exchanges, whether or not the value of these investments may be affected by government decisions. An office holder must either sell these assets or place them in a blind trust, which someone else manages at arm's length. That trustee may not receive any instructions from the office holder except for general guidance on the degree of acceptable risk at the time of the original trust agreement. As the trustee manages the trust through the buying and selling of shares, the public office holder remains truly blind to the nature of their actual holdings. They are entitled to know the value of their trust but not its composition.

Where a public office holder has an ownership interest in a privately held company that has contracts with federal government institutions, the blind trust is not suitable. It cannot be credibly claimed that the individual is "blind" to their interests. The solution is to establish a blind management agreement and to make a public declaration identifying the assets involved. These agreements name a manager who is at arm's length to the office holder to exercise all rights and privileges associated with the shares of the company. While this means the public office holder has no ongoing involvement with the company, he or she must withdraw from any discussions or decision-making in the discharge of official duties that could directly affect the company and its assets.

The Ethics Counsellor must approve all blind trusts and blind management agreements, including the selection of trustees.

Personal and corporate debts

A public office holder may owe money to individuals or organisations that have business dealings with federal government institutions. In these cases, the Ethics Counsellor will determine whether additional compliance arrangements are necessary in order to prevent any conflict of interest from arising. These would include not dealing on any matter which directly benefits that individual or organisation.

Outside activities

Public office holders are prohibited from engaging in the practice of a profession, actively managing or operating a business or commercial activity, retaining or accepting directorships or offices in a company, holding office in a union or professional association, or serving as a paid consultant. A public office holder may hold directorships, memberships and honorary positions in non-commercial, charitable and philanthropic organisations, provided that he or she is not involved in assisting these organisations in any dealings with the federal government. Each activity of this type is subject to the approval of the Ethics Counsellor and to a public declaration.

Gifts, hospitality and other benefits

The Code's provisions also specify the circumstances under which gifts, hospitality and other benefits may be accepted. Gifts received from family members and close personal friends and those worth less than CAD 200,[2] that will not influence the office holder in the exercise of public responsibilities, are acceptable and need not be disclosed.

Public office holders may accept gifts and other benefits worth more than CAD 200 if they arise from work-related activities or public events in which they participate in an official capacity, provided the gift or benefit is a normal expression of hospitality or protocol. These gifts, hospitality or benefits must be disclosed to the Ethics Counsellor and publicly declared. Gifts under CAD 1 000 in value may be retained by a public office holder. Those of a value greater than CAD 1 000 must be turned over to the office holder's department or agency.

These provisions complement the guidance on gifts, hospitality and other benefits set out by the courts, especially in their decisions on cases relating to Section 121(1)(c) of the Criminal Code. That section makes it an offence for officials or employees of the government to accept benefits of any kind by themselves or through family members, directly or indirectly, from people who

have dealings with the government unless they have had the consent in writing of the head of the branch of government that employs them.

Avoidance of preferential treatment

The Conflict-of-Interest Code has very specific rules on preference. For example, a public office holder is to take care to avoid being placed, or appearing to be placed, under obligation to someone who might benefit from "special consideration" on the part of the public office holder. Limitations are placed on Ministers and Secretaries of State on the hiring of members of their immediate families by their offices and departments. As well, they need to ensure that members of the immediate family of another Minister, Secretary of State or party colleague in Parliament are not to be hired by their department except by means of an "impartial administrative process" in which they play no role. They are, however, permitted to hire a member of a colleague's immediate family for a position on their political staff.

One of the more important provisions on preference in the Code is the requirement that public office holders "shall not accord preferential treatment in relation to any official matter to family members or friends or to organisations in which they, family members or friends have an interest".

The post-employment provisions of the Code

The Conflict-of-Interest Code also sets out measures that apply to public office holders when they leave office. There is a one-year "cooling-off" period (two years for Ministers) on taking employment with any organisation with which they had direct and significant official dealings during their last year in public office. As well, office holders may not make representations on behalf of third parties to their former departments and other federal government agencies with which they had direct and significant official dealings during their last year in public office. As well, they are prohibited from giving advice to an employer or client based on information obtained in the course of their public office if this information is not available to the public.

Dealings with judicial and quasi-judicial tribunals

Beyond the Conflict-of-Interest Code, guidelines exist to address a variety of situations that public office holders may face. One of these reflects the long-standing prohibition against Ministers and their staff intervening on behalf of constituents or anyone else concerning any matter before the courts. This prohibition protects judicial independence. The protection of judicial independence has been extended to quasi-judicial agencies such as the Canadian Radio-Television and Telecommunications Commission (CRTC), the Immigration and Refugee Board (IRB) and the Employment Insurance Boards

of Referees. These tribunals were established by Parliament to operate "at arm's length" from government. As a consequence, there are limitations on the ability of a Minister or Secretary of State to act on behalf of constituents with federal quasi-judicial tribunals. The guidelines state that Ministers, Secretaries of State and their staff may not intervene, or appear to intervene on behalf of anyone, including constituents, with federal quasi-judicial tribunals on any matter before them that requires a decision in their quasi-judicial capacity, unless authorized by law.

Dealings with departments and agencies

Under Canadian Cabinet convention, a Minister must not speak about or otherwise become involved in a colleague's portfolio without first consulting the responsible Minister and gaining that Minister's approval. This reflects the accountability of Ministers to Parliament for their departments and the accountability of public servants to their Minister. At the same time, Ministers also have very important responsibilities to represent the interests of their constituents.

In practice, this means that Ministers' staff in constituency offices may contact public servants in federal government institutions on behalf of constituents. However, Ministers and Secretaries of State and their staff are expected to take up any representations or interventions on behalf of constituents directly with the responsible Minister and his or her ministerial office.

Dealings with crown corporations

Guidelines exist for members of Cabinet regarding their dealings with Crown corporations. Every Crown corporation is accountable to Parliament for the conduct of its affairs through a responsible Minister. But, unlike regular government departments, Crown corporations have a greater degree of managerial autonomy with responsibility exercised by the board of directors. The guidelines establish that the Minister responsible for a Crown corporation must not become involved in day-to-day operational matters but can deal with the corporation on its broad policy orientations.

Other Ministers, including Secretaries of State, may not personally contact a Crown corporation on behalf of a constituent. Any such contact must be left to that ministerial staff who deal with constituency issues. The purpose is to protect the managerial autonomy of the Crown corporation.

Ministers and activities for personal political purposes

On 11 June 2002, the Prime Minister announced new guidelines for the Ministry relating to activities for personal political purposes. The guidelines

refer to four specific areas that offer a potential conflict between a Minister's public duties and his or her private political interests in a leadership campaign:

- Individuals working on the campaign at the same time as they are working on contracts with the Minister's department.
- Lobbyists registered as lobbying the Minister's department while working on his or her campaign.
- Operations of the ministerial office.
- Fundraising.

Box 22. **The Values and Ethics Code for the Public Service in Canada**

Public servants in the Government of Canada are subject to a separate *Values and Ethics Code for the Public Service*, which was introduced in June 2003 to take effect on 1 September 2003. It replaces previous codes and guidelines.

It sets out the democratic, professional, ethical and people values that should guide all public servants' decisions and actions. The document includes updated conflict-of-interest and post-employment measures that clarify an employee's duties to prevent and avoid conflict of interest, and provides for transparent decision-making about gifts, hospitality and other benefits. Although there are some differences, the conflict-of-interest measures for public servants support the same principles and objectives as those for public office holders.

The deputy minister or head of each department and agency is responsible for ensuring public servants have the help and guidance to follow the spirit and letter of the Values and Ethics Code. The Code is a Condition of Employment for all employees. Breaches of the Code will be considered within an expanded definition of wrongdoing under the Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace. Public servants seeking avenues of dispute resolution will have access to a neutral third-party: the Public Service Integrity Officer. This ensures that employees who wish to report a breach of the Code can do so in confidence. Failure to comply with the Code could mean disciplinary action, up to and including termination of employment.

C. The roles and responsibilities of the Office of the Ethics Counsellor

The Office of the Ethics Counsellor is accountable to the Prime Minister for the administration of the *Conflict of Interest and Post-Employment Code for Public Office Holders*. The Office has three major roles with respect to the administration of the Conflict-of-Interest Code and the other guidelines that set out government's ethical framework for public office holders. These three major roles are:

1. The advisory role.
2. The review role, and
3. Partnership role.

The advisory role and the review role are covered in detail in the following sections. The third is a partnership role through which the Office collaborates with other governments and organisations, at home and abroad, with interests in public and private sector ethics.

The Office of the Ethics Counsellor also administers the *Lobbyists Registration Act* on behalf of the Minister of Industry and the Ethics Counsellor is responsible for enforcement of the *Lobbyists' Code of Conduct*.

The advisory role

The most important work of the Office of the Ethics Counsellor, both in terms of substance and time, is its advisory role. It is for this reason that the position was called Ethics Counsellor, not Ethics Commissioner.

The Office has important responsibilities to work with public office holders as they arrange their personal affairs to ensure full adherence to the principles of ethical government. While this work necessarily takes place in confidence, it enables the Ethics Counsellor and the Office advisors to assess the risks between the public responsibilities of office holders and their private interests. All conflicts are resolved in favour of the public interest.

The Office of the Ethics Counsellor usually offers advice to public office holders through an administrative process that has three elements, as shown in the accompanying chart:

- Initial compliance.
- Annual review; and
- Post-employment.

The Office of the Ethics Counsellor has produced a publication entitled "Implementing the Conflict-of-Interest Code: The Case of Joe Q. Public"[3] that contains completed examples of the principal documents that the Office of the Ethics Counsellor uses to apply the *Conflict of Interest and Post-Employment Code for Public Office Holders*.

Initial compliance

Potential candidates for appointment to public office often communicate with the Office of the Ethics Counsellor before a possible appointment in order to determine their obligations under the Conflict-of-Interest Code and the impact this will have on their private interests. The Prime Minister's Office and the Privy Council Office (Cabinet Office) are in regular communication with the Office on appointments.

The Ethics Counsellor writes to each new public office holder upon appointment with details about the Code and its obligations. The next step is for the public office holder to sign the Certification Document signifying his or her acceptance that observance of the Code measures is a condition of holding his or her position.

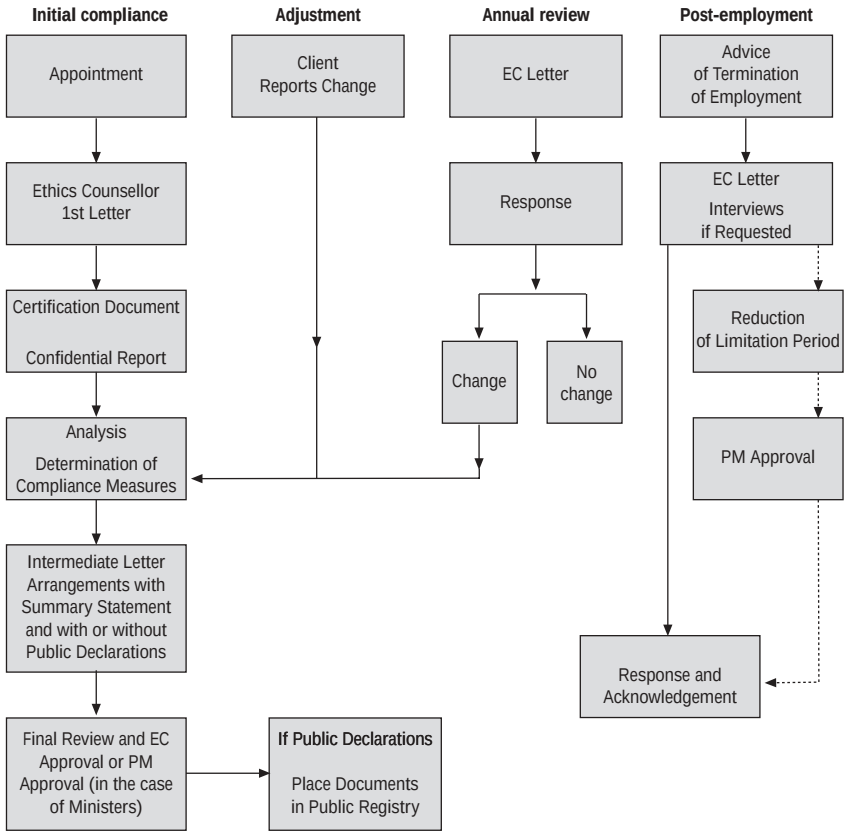
The cornerstone of the compliance process is completion of the public office holder's Confidential Report. This report enables the Office to analyse the potential for conflicts that will need resolution. The report, which is to be submitted within 60 days from appointment, must describe all of the office holder's private interests such as any assets, liabilities and outside activities. Public office holders must also indicate any relationship between their private interests and federal government institutions. They specifically are asked to identify any possible impact on their official duties and responsibilities that may arise in relation to contracts, financial contributions or other forms of government assistance.

All compliance arrangements are to be completed within 120 days of appointment, unless the Ethics Counsellor agrees to an extension. Once the confidential report is in hand, an advisor in the Office will work with the public office holder to identify the most appropriate ways of eliminating potential conflicts. For assets, these measures might include a public declaration, arm's length sale of the assets or the establishment of a blind trust or blind management agreement. For outside activities, the measures may include resignation or withdrawal from any direct dealings with the federal government on behalf of an organisation.

Once this work has been completed, the public office holder signs a summary statement noting the compliance measures used to meet the requirements of the Code. With this, the Ethics Counsellor formally approves the measures and confirms this to the public office holder, except in the case of members of the Ministry (Ministers and Secretaries of State), where the Prime Minister makes the formal approval. All summary statements of public office holders as well as their public declarations of assets, outside activities, and gifts and hospitality can be found in the Public Registry on the Ethics Counsellor's website at: *http://strategis.gc.ca/ethics*

Figure 12. Process for Administering the Conflict of Interest and Post-Employment Code for Public Office Holders in Canada

Office of the Ethics Counsellor



Source: OECD (2002).

Annual review and ongoing reporting

Public office holders have an obligation to remain in compliance with the Code at all times. They are required to inform the Ethics Counsellor within 30 days of any changes to their assets, debts and outside activities. As well, they are to report within 30 days of the receipt of any gifts, hospitality or other benefits, worth more than CAD 200.

To complement this ongoing reporting, on the anniversary date of the public office holder's appointment, the Ethics Counsellor will initiate an annual review of the public office holder's confidential report and compliance arrangements.

Post-employment

The post-employment measures are designed to protect the public interest by ensuring that public office holders do not appear to take advantage of their last year in office to obtain employment with an organisation with which they had "direct and significant official dealings" in that year. As well, they cannot lobby their old department or any other federal government organisation with which they have had direct and significant official dealings on behalf of their new employer for one year after leaving office or use insider information.

The Office formally communicates with these individuals at the end of their tenure, setting out these post-employment obligations. Many public office holders do not, however, wait until the last moment. They seek advice in advance as to what is permissible. It is also not uncommon for the new employer of a former public office holder to seek confirmation that the individual is in full compliance with the relevant obligations.

Representing constituents: advice to Ministers, Secretaries of State and exempt staff

Some of the most important advisory work of the Office deals, not with the individual compliance arrangements of public office holders, but with the operations of ministerial offices.

With the exception of the Leader of the Government in the Senate, Ministers and Secretaries of State are almost always elected members of the House of Commons who have important responsibilities to represent the interests of their constituents with the federal government. Nonetheless, as Ministers they have considerable decision-making powers and they need to exercise care when they make representations on behalf of constituents. In recent years, the government has placed limitations on how Ministers and their offices can deal with quasi-judicial tribunals and Crown corporations. To respect an important Cabinet convention, Ministers and their offices are advised to deal directly with their Cabinet colleagues or their ministerial offices and not with public servants in another department.

The Office organises briefing sessions on these issues with Ministers and their offices at the time of appointment and annually thereafter. The sessions include briefings of constituency staff in the ridings because this is where most of the day-to-day work on behalf of constituents takes place. The Office receives requests for guidance from Ministers' offices almost daily on a wide range of issues. Typical subjects include guidance on responding to requests for letters of recommendation or character references, gifts and hospitality, fundraising for charities and support for projects at the federal, provincial or municipal levels. This activity reflects the close working relationship between the Office of the Ethics Counsellor and ministerial offices.

Part-time Governor-in-Council appointees

Part-time Governor-in-Council appointees are only subject to the principles of the Conflict-of-Interest Code and any statutory provisions or guidelines that apply to their agency. Since 1998, the Office of the Ethics Counsellor has provided formal advice to these appointees. The advice given to part-time Governor-in-Council appointees informs them of their obligations under the Conflict-of-Interest Code and sets out any statutory provisions on conflict which might apply as well as the code of conduct, if any, established by their agency. The advice includes guidance on the acceptable level of involvement in political activities. For example, part-time members of quasi-judicial tribunals need to resign if they wish to seek a nomination, fundraise or campaign. Members of non-quasi judicial organisations may become involved in these activities but only if they take leave without pay.

Lastly, the Office draws their attention to particular court decisions. Since part-time Governor-in-Council appointees are considered "officials" within the meaning of Section 121 (Frauds on Government) of the Criminal Code, any dealings they may have on behalf of private sector clients with regard to business with the federal government may fall within the parameters of the Supreme Court of Canada's interpretation of the Criminal Code.

Advice to departments, agencies, boards, commissions and tribunals

Federal departments, boards, commissions, tribunals and advisory panels regularly approach the Office of the Ethics Counsellor for advice on conflict of interest and other ethical issues. For example, the Office has worked with many tribunals, boards and commissions as they develop guidelines of acceptable conduct and behaviour for their officials and employees that complement the principles of the Conflict-of-Interest Code.

The Office works closely with Treasury Board of Canada Secretariat and individual departments to clarify issues in relation to conflict of interest affecting public servants in line with the *Values and Ethics Code for the Public Service of Canada*. This assistance has included the development of a model blind trust agreement as a mechanism for dealing with the divestment of controlled assets by public servants.

Members of Parliament and Senators

While Ministers and Parliamentary Secretaries are covered by the Conflict-of-Interest Code, other members of Parliament and Senators are not. Nevertheless, the Office of the Ethics Counsellor is often asked for guidance by members of Parliament and Senators on potential conflict-of-interest issues.

The review role

The review role of the Office of the Ethics Counsellor began in 1994 and has expanded over time. When the Office was established in 1994, it was expressly stated that the Prime Minister could ask the Ethics Counsellor to investigate allegations raised about a Minister. As the Office evolved, the Ethics Counsellor began to undertake inquiries on his own initiative of allegations pertaining to the obligations and rules of the Conflict-of-Interest Code.

The Office has also reviewed new and emerging issues in order to make recommendations to the Prime Minister. The eight-point plan of action on government ethics, which the Prime Minister announced on 11 June 2002, expanded this review role further when he said that the "Ethics Counsellor will inquire into complaints, or other matters related to a Minister of the Crown, referred to his Office by a member of Parliament". These reports are made public.

This steady expansion indicates how the review role has become increasingly important over time. Public office holders, especially Ministers, are under intense public scrutiny in Parliament and from the media to ensure that they live up to contemporary ethical expectations. Because the Office of the Ethics Counsellor works proactively with office holders to avoid conflicts in advance, the results of inquiries generally demonstrate that office holders have usually been careful to arrange their affairs and decision making in line with the Conflict-of-Interest Code and related guidelines.

In addition to the information on major issues that have arisen over time, which is set out in this section, details on some inquiries carried out by the Ethics Counsellor can be found on the website at *http://strategis.gc.ca/ethics*. Similarly, some individual cases where the Ethics Counsellor provided advice can also be seen on the homepage, such as the most recent guidelines provided for Mr. Paul Martin in relations to his personal assets if he were to become Prime Minister of Canada.

Dealings with judicial tribunals, quasi-judicial tribunals

In 1994, the then Minister of Canadian Heritage was alleged to have written a letter in support of a constituent's application to the Canadian Radio-Television and Telecommunications Commission (CRTC), a quasi-judicial organisation of the federal government. The CRTC reports to Parliament through that Minister. As a result of the allegations made, the Ethics Counsellor was asked to review the situation and recommend guidelines on dealings between Ministers' offices and quasi-judicial bodies in respect of constituency matters. The Prime Minister issued the guidelines on 31 October 1994.

In 1996, the then Minister of National Defence and Veterans Affairs was reported to have written a letter on behalf of a constituent to request an accelerated case review by the Immigration and Refugee Board. The Ethics Counsellor concluded that the Minister had breached the 1994 guidelines on dealings with quasi-judicial organisations and the Minister resigned from the Cabinet.

Private interest and outside activities

One of the principles of the *Conflict of Interest and Post-Employment Code for Public Office Holders* provides that public office holders are obliged to perform their official duties and arrange their private affairs in a manner that will bear the closest public scrutiny. In this day and age, the private financial affairs of public office holders can be quite complex, involving other investment partners or inter-corporate ownerships. The application of the Conflict-of-Interest Code provisions strives to strike an appropriate balance between the private interest of an individual and that individual's public duties and responsibilities. This balance is predicated on the view that the public interest must prevail in all cases.

The complexity of some cases involving private interests, in the absence of an awareness of all of the relevant facts, can give rise to serious allegations of apparent or potential conflict of interest. Two cases that the Office of the Ethics Counsellor was asked to examine demonstrate this point.

In the **first case**, allegations were made in May 1999 that the then Minister of Finance was in a conflict of interest because of his involvement in the Cabinet decision on compensating victims of tainted blood products. The Prime Minister asked the Ethics Counsellor to investigate and report on the matter.

Specifically, concerns were expressed that the Minister was a member of the board of directors of the Canada Development Corporation between 1981 and 1986, which had a controlling interest in CDC Life Sciences Inc. This company, in turn, controlled Connaught Laboratories Limited, which was under contract to the Canadian Red Cross to fractionate blood plasma. The concerns noted that the government's 1998 decision on compensation for hepatitis C victims excluded those who were infected pre-1986 when the Minister of Finance was on the Canada Development Corporation board.

After an extensive investigation of the matter, the Ethics Counsellor concluded that the Minister of Finance was not in a position of conflict of interest when he participated in a Cabinet decision on compensation a decade later. The report of this enquiry was tabled on 7 April 2000, and is available on the Internet.[4]

In the **second case**, allegations were made in 1999 that the Prime Minister was in a conflict of interest because his constituency office assisted the Auberge Grand-mère in obtaining a business loan and grants from federal institutions at a time when, it was claimed, the Prime Minister had a financial interest in the adjacent golf course.

The Ethics Counsellor reviewed the facts and concluded that the Prime Minister ceased having an ownership interest in the Auberge Grand-mère and the golf course in 1993, prior to his becoming Prime Minister. In April 1993, the numbered holding company owned by the Prime Minister and his family sold its interest in the Auberge Grand-mère. Later, in November 1993, the holding company sold its shares in the company owning the golf course.

The sale of the golf course shares was unsecured. In 1996, the Prime Minister advised the Ethics Counsellor that he had received no payments regarding the sale of the golf course shares and wanted to know what his options were. His lawyer was of the view that he had two options: to take the buyer to court or to try, through his lawyer, or to organise a method by which the payment would be made. The Prime Minister chose the latter course. The legal debt owed the Prime Minister was unaffected, and remained the same, whether the value of the golf course increased or decreased.

In the fall of 1999, the Ethics Counsellor was informed that a settlement had been reached for the payment of the golf course shares sold by the Prime Minister in 1993. The sale therefore permitted the financial obligations to the Prime Minister to be discharged.

The position of the Ethics Counsellor, in 1999 and since, has been that the Prime Minister had no financial interest in the golf course nor in the Auberge, two entirely separate entities. Because the shares were never returned to the Prime Minister's holding company, the Prime Minister had never reacquired the interest in the golf course and, therefore, was not in a conflict-of-interest situation. The actions of his office in respect of the Auberge were those of a member of Parliament supporting a constituent.

Preferential treatment

One of the more important obligations in the Conflict-of-Interest Code is that of preferential treatment. The principal rule states that public office holders shall not

> "*accord preferential treatment in relation to any official matter to family members or friends or to organisations in which they, family members or friends, have an interest.*"

Over the years since 1994 there have a been a number of inquiries involving such matters, for example, as a spouse of a Minister being hired by a government department and contracts being given to friends and close political associates.

Gifts and invitations

The Conflict-of-Interest Code has rules on the acceptability of gifts and hospitality. This has led to a number of reviews, most of them referred to the Ethics Counsellor by public office holders seeking guidance. These have involved such matters as accepting an invitation to attend a sporting or cultural event, the appropriateness of gifts from organisations dealing with the public office holder's department or agency and accepting transportation in a company-owned aircraft to travel to an official event. In this latter case, which normally would involve travel to a remote area, the Office requires a payment to the company of the commercial equivalent of the flight costs.

In one case, a complaint under the Conflict-of-Interest Code and the *Lobbyists' Code of Conduct* was received concerning an invitation by Bell Canada Enterprises Inc. to the Prime Minister to play a round of golf with a professional golfer at the Bell Canadian Open Pro-Am event. The Ethics Counsellor concluded that the Prime Minister was not in a conflict of interest. The decision of the Ethics Counsellor was that the invitation to the Prime Minister was as the official representative of the Government of Canada to a major sporting event. This conclusion drew from the decision made earlier in identical circumstances by the Ontario Integrity Commissioner involving an invitation to the Ontario Deputy Premier to play in the Canadian Open Pro-Am when it was held in Ontario.

D. Conclusion – A continually rising standard

Good governance, both in the public and private sectors, is essential for any society to operate effectively. The Government of Canada has responded to the expectations of Canadians that their governments make decisions that are demonstrably in the public interest. It has taken action after action to make clear that the personal interests of public office holders must not influence their decisions. In that regard, the creation of the post of Ethics Counsellor in 1994 and the establishment of the Office of the Ethics Counsellor represented a major shift in how ethics issues were addressed in the Government of Canada. Those decisions formed the basis for continued change in the years since.

In the eight years since the establishment of the Office of the Ethics Counsellor, public office holders, and particularly Ministers, have witnessed the development of a more challenging ethical environment. They have seen a steady rise in scrutiny about potential conflict between their personal and public lives. The guidelines that the Ethics Counsellor uses have become richer with experience and the analysis of new questions.

The results of these changes are positive for Canadian democracy and public decision-making. As Canadians raise the bar and become more

demanding in terms of what actions by public office holders are acceptable, the Prime Minister, the government and the Office of the Ethics Counsellor have responded. Public office holders have generally recognized changing public expectations and adapted to the increasingly rigorous set of standards to which Canadians hold them accountable. There is every reason to believe that this trend to greater scrutiny and raised expectations will continue – and that the principle-based approach that the Government of Canada uses will continue to develop to meet the needs of citizens and public office holders alike.

Notes

1. The full text of the *Conflict of Interest and Post-Employment Code for Public Office Holders* is available on the Ethics Counsellor's website at: *http://strategis.gc.ca/ethics*
2. The figures in this chapter are in Canadian Dollar (CAD).
3. This publication can be consulted on the Ethics Counsellor's website at: *http://strategis.gc.ca/ethics*
4. The report of this enquiry is available under the heading "Items of Special Interest" at: *http://strategis.gc.ca/ethics*

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Managing Conflict of Interest in the Public Service
OECD Guidelines and Overview

Prevention Through Updated Regulations and Sanctions: The French Experience

by

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A. Summary

The prevention of conflicts of interest is a long-standing and constant concern in France. Both criminal law and the rules applicable to public officials have long contained provisions in this regard, and there is currently renewed interest in this issue.

One of the earliest references to this issue in the history of French law is an order issued by Saint Louis in 1254 and another by Charles VI in 1388, which, following the principles of Roman law, prohibited governors from borrowing money or acquiring assets within their province, subject to cancellation of contracts and confiscation of assets by the king – in other words, prohibiting these officials from entering into contracts with the persons that they were responsible for governing.

In the years following the Second World War, the state played a major role in the reconstruction of France and became closely involved in economic activities, with public officials quite often managing the public institutions and state-owned companies responsible for reconstruction. Again in the 1980s, following a wave of nationalisations, numerous companies in the financial and insurance sectors came into the public sector and many public officials were appointed to manage them in line with the government's policies. At the same time, a major process of decentralisation was transferring new responsibilities to local governments, and local elected officials were being given new, independent decision-making powers outside the supervision of the central government.

By the end of the 1990s, nearly all of these companies nationalised in the 1980s had returned to the competitive private sector, and the problem of public officials accepting positions in companies with which they had had dealings while working in ministerial departments became more serious. At the same time, local elected officials had become involved in the economic life of their regions and communities, and potential situations of conflict of interest had arisen at the local level.

The recent consolidation of the Criminal Code has provided an opportunity to examine closely the specific offences applicable to public officials, which have been redefined, and in particular the unlawful use of a public position to gain an undue advantage, known as the offence of "unlawful obtaining of an advantage" (*prise illégale d'intérêt*). Regulatory provisions have

also been laid down and commissions reporting to the Prime Minister have been established to review cases of public officials who leave government service for the private sector.

B. Prevention through criminal sanctions

Elected officials and civil servants who fail to maintain the required standards of honesty in the performance of their duties are subject to severe criminal sanctions, which are laid out in the provisions of the Criminal Code punishing corruption, extortion and misappropriation of public funds. However, as early as 1919, these penalties were supplemented with a series of preventive provisions that have been described as "crime deterrents", including the offence of **unlawful obtaining of an advantage**.

In addition to the measures prohibiting public servants from engaging in private activities outside their official duties laid down in successive civil service regulations (of 1946, 1959 and 1983-84), lawmakers wished to ensure that no-one performing public duties, *i.e.* not only public servants, but also elected officials and anyone involved in public decision-making, would be in a position in which they might fail to monitor a company in which they have an interest with due impartiality and care, or might favour this company to the detriment of public interests and of other companies in the same sector. The aim of this legislation is to avoid any suspicion of partiality and to prevent any conflict of interest from arising when public officials perform their duties.

Nature and characteristics of the offence

Since 1919, the previous version of the French Criminal Code had punished a specific offence known as the "offence of interference" (*délit d'ingérence*). This offence has been reincorporated under a different name into the new Criminal Code adopted in 1992. Article 432-12 of the Criminal Code is now drafted as follows:

> "*The act, by a person entrusted with public authority, charged with a public service mission or holding an elective public office, of obtaining, accepting or retaining, directly or indirectly, an advantage of any kind from an enterprise or an operation for which, at the time of the act, he is responsible, either wholly or in part, for ensuring the monitoring, administration, liquidation or payment, shall be punishable by five years' imprisonment and a fine of 500 000 FF.*"[1]

These provisions are applicable to the following persons:

- Anyone to whom public decision-making power over persons and assets has been delegated.
- Anyone who, without having decision-making power or supervisory authority, performs duties in the public interest, such as members of

commissions that give opinions to the public decision-making authorities or themselves make decisions.

- Local and national elected officials.

Although the scope of these provisions seems very broad, it should nevertheless be pointed out that it is limited by the fact that only persons who actually carry out administrative or monitoring duties are concerned. Furthermore, specific provisions have been adopted exempting elected officials of small communes (with a population under 3 500 inhabitants). These provisions have been widely reported in the media, and are now familiar to everyone.

There have recently been a large number of cases in which these provisions have been enforced. Most often, they have involved local elected officials, such as mayors, their deputies or city councillors. In these cases, legal action was taken after a new administration was elected in a local government, which ordered an audit of the former administration. The underlying idea was to discredit and thereby permanently eliminate the defeated political opponent by bringing criminal proceedings, with political considerations often prevailing over concern for raising ethical standards in government.

The most common reason why these cases have been brought is that an elected official had gone through a third party (a partnership or company or family member) to sign supply or work contracts with the commune or to lease or purchase assets from it. However, legal action has also been taken against a president of a chamber of commerce, a secondary school supply officer, tax officials, etc.

In addition to these criminal provisions concerning serving public officials, there are also provisions that concern former officials who have moved to the private sector, a practice commonly known in France as "*pantouflage*".[2] These provisions are more recent, having been introduced by two laws that entered into force in 1960 and 1967.

Article 432-13 of the Criminal Code stipulates the following:

> *"If a public servant or employee of a public administration who has been directly responsible for ensuring the control or monitoring of a private enterprise, for concluding contracts of any kind with a private enterprise or for expressing opinions on operations carried out by a private enterprise later becomes associated with any of these enterprises by working for them, advising them or owning capital in them before a period of five years following the termination of these public duties has elapsed, this act shall be punishable by two years' imprisonment and a fine of 200 000 FF."*[3]

These provisions only concern public servants and equivalent staff, but not elected officials and occasional collaborators (such as persons asked to

serve on commissions). However, their purpose is the same as the preceding provisions, *i.e.*, to prevent situations in which an official might be tempted to give a company preference, possibly at its suggestion, in exchange for a promise of employment, a partnership or a profitable investment.

For an offence to be committed, the person concerned must have been responsible for the monitoring, administration, liquidation or payment of the company at the time of the offence. While the three latter cases are relatively precisely defined, since they are closely related to the definition of the duties of the person concerned, the first is much broader and has always been interpreted broadly by criminal courts. It is irrelevant whether the person in question had independent personal decision-making power or only played a minor role in preparing decisions that were later made by a hierarchical superior or a separate body. Consequently, this offence may be applicable to technical civil servants responsible for carrying out the day-to-day monitoring of public work sites, approving invoices submitted by companies or preparing the certification of services provided, even if they have no decision-making power or signing authority.

The preventive nature of the offence is shown by the characteristics of the acts to which criminal judges refer in determining whether an offence has been committed. To be convicted of the offence, the person concerned need not have derived any advantage from the prohibited operation nor have harmed society in any way. He need not have had the intent to commit a crime and the fact that he may have acted in good faith is immaterial. It is not even necessary that the agreement have been kept, and even if this agreement had been become null and void, this is irrelevant to the offence, for what is punishable is the fact that he used his official position to obtain an advantage, *i.e.* to establish the material or legal link from which he hoped later to derive an advantage. Lastly, he is not relieved of his criminal responsibility because he has taken positive steps that have corrected the harmful effects of his acts on society.

It must also be borne in mind that although these provisions concern public officials, anyone who has assisted in committing the offence may be prosecuted for aiding and abetting a crime. Consequently, this offence applies to anyone who plans or promotes a situation in which a public official obtains an undue advantage.

The courts have enforced these provisions strictly, and the media often report their decisions which helps make them widely known. However, the article of the criminal code concerning former civil servants is less well known, and there have been cases of officials who, either because they are naïve or ill-informed, have left government to work in a company that they had monitored in the past. Although they may have been acting in good faith, they have still committed an offence.

C. Regulations

In addition to these criminal sanctions, there are a number of regulations aimed at the same goal of preventing conflict-of-interest situations from arising.

Elected officials

Regulations regarding elections: ineligibility and incompatibility

National elections

The regulations regarding the election of members of Parliament stipulate a number of cases in which being a member of Parliament is incompatible with corporate management responsibilities in certain kinds of companies, such as enterprises subsidised or assisted by the State or by regional or local governments, and companies in the banking, civil engineering and real estate development sectors. When members of Parliament are in one of these situations of incompatibility, they must choose between their Parliamentary office and the corporate position within one month. If they fail to do so, the Constitutional Council may declare that they have automatically resigned.

Local elections

For elections in the smallest governmental units, *i.e.* communes, the law stipulates that "*businessmen providing municipal services*" may not be elected as city councillors unless they have not provided these services in the electoral district in which they are standing for election for a period of at least six months.

These provisions concern persons who have personally entered into service provision contracts with the commune, whether they are salaried managers or owners of the companies contracting with the commune. This measure eliminates any temptation for someone to seek to continue indirectly through a third person or company the contractual relationship that existed with the commune before being elected.

The ineligibility of candidates is initially determined by the authorities responsible for ensuring that the election proceeds smoothly, and then later by the election judge if necessary, at the time of the election. When there has been a failure to detect that a candidate is ineligible in time and this is only determined by the election judge, the election of the ineligible candidate is automatically cancelled, regardless of whether the candidate has resigned from his private position after the election results were announced.

For larger governmental units, such as *départements* and regions, the prohibition is less broad, since only the position of *a businessman providing*

services to départements or regions is incompatible with the duties of an elected official to the deliberative assemblies of these levels of government. An elected official who is in this situation of incompatibility has a period of one month to choose between his elective duties and the position that is the source of the incompatibility.

Before elections, the central government's representative in the *départements* (the prefects) check lists of candidates to determine if there are any cases of incompatibility or ineligibility. If an incompatibility arises during the term of office, the prefect must declare that the elected official in question has automatically resigned from the office in the case of communes; for other levels of government, this declaration is made by assembly to which the elected official belongs, which may act on its own initiative or at the request of any voter. Consequently, it is a procedure that may be initiated by all citizens.

In addition, administrative judges monitor not only elections, but also any decisions declaring that elected officials automatically resign from their office or denying requests by voters in this regard. The case law of administrative judges on these matters is long-standing, consistent and strict. The judge before whom a case is initially brought must rule within a short period of time prescribed by law, and those who disregard these rules are subject to severe sanctions.

The rules governing local assemblies

The rules governing local assemblies stipulate that when there is an issue involving a conflict between the interests of the legally designated chair of an assembly and the local government that it represents, he must be replaced when this matter is discussed. This procedure, which enables him to disqualify himself from discussions, but still ensures that the assembly is effectively chaired, prevents the conflict of interest that would exist if he fully exercised his functions of chair during the assembly. Failure to comply with this rule is illegal and if the decision made in such cases is brought before a judge, either by the central government authority responsible for ensuring its legality or by citizens, it will be cancelled. This is the case, for example, for decisions involving construction projects on land owned by a mayor or one of his family members. Cancellation of decisions in such cases is automatic, and the case law in this regard is also long-standing, consistent and strict.

Financial transparency in politics

Certain elected officials are required to file a declaration of assets at the beginning and end of their term of office. The Act of 11 March 1988, amended in 1995 and 1996, has established a system that makes it possible to detect any

assets accumulated by elected officials during their term of office that might be the outcome of unlawful use of their office to obtain undue advantages from companies engaging in business with the level of government to which they were elected.

Members of Parliament and most elected officials in *départements* and regions and the mayors and deputy-mayors of large cities are subject to this requirement. In all, over 3 000 elected officials are required to file a declaration of assets (members of the Government and managers of local and national government-controlled enterprises are also subject to this requirement). Those who fail to comply with this formality at the beginning of their term of office are sanctioned by automatic resignation from their office, pronounced by a representative of the central government for local elected officials and the Constitutional Council for members of Parliament. Failure to file this declaration at the end of their term of office is also sanctioned, in this case by ineligibility to hold a public office.

Given the severity of the sanctions, officials always comply with these formalities, even though they must sometimes be reminded of this requirement. The initial and final declarations are examined at the end of the term of office by a commission composed of the presiding judges and members of the three highest courts in France (Commission for Financial Transparency in Politics). If comparison of the declarations shows that official's assets have increased unaccountably, the commission asks the official's concerned to provide explanations and if necessary questions him directly and if it is still unsatisfied, refers the case to the public prosecutor's office to determine whether legal action should be taken; since the commission was established, this has occurred fewer than ten times. The commission has no contact with the person concerned and bases its decision on the sworn statements that he has filed and the explanations that he has provided; it has no investigative power and can have no contact with other administrations, such as the tax authorities. Its procedures are protected by secrecy.

The French are very attached to privacy, which is protected by the law and the courts. Individuals' personal assets are considered to be an aspect of their private life and the sole fact that someone has been elected is not considered as justifying making their assets public, except for presidential elections, following which the declaration of assets of the President of the Republic is published in the Official Gazette. The declarations of other elected officials are confidential, and only the commission's secretariat, *rapporteurs* and members have access to them. After they have been examined by the commission, these declarations are archived and will become accessible to the public several decades later, pursuant to the legislation on archives.

Given this attitude on the part of the French, there is no support at all for the idea of making public the declarations of assets of elected officials or of extending this requirement to other categories of persons – in particular to elected officials in small communities or public servants – or for requiring anyone to declare their assets to any other authority than the tax administration.

To make its mission better known, the Commission for Financial Transparency in Politics has created an Internet site[4] which provides explanations of its operating procedures and its annual reports. Elected officials can also download the necessary declaration forms.

Public servants

Statutory rules

In addition to and supplementing the criminal provisions described earlier, there is a set of statutory rules that impose traditional obligations on public officials aimed at preventing conflict of interest. In 1946, a general statute was established laying down the obligations and rights of those entering in government service. Following the decentralisation of the 1980s, three distinct levels of civil service were created: the central civil service, regional and local authorities and the public hospital sector. These three levels are governed by common regulations that lay down the rights and obligations of all public servants and by three separate sets of regulations that set out the general rules that govern each level. Although recruitment and management procedures in the various levels of the civil service differ, they are all subject to the same the ethical requirements. At the time of their recruitment and initial training, public servants are informed about these rules and regulations, which are referred to in all decisions concerning their future career and which they know well.

The obligation to devote their professional activity exclusively to their duties

This obligation is sometimes designated as the prohibition against holding public employment and engaging in private activity. The current regulation is worded as follows:

> *"Civil servants shall devote their professional activity exclusively to the performance of the duties that they are assigned. They may not engage in a gainful private professional activity of any kind. The conditions in which exceptions may be made to this prohibition on an exceptional basis shall be established by a decree of the Council of State."*

This obligation applies not only to established permanent public servants but also to non-established staff and ministerial cabinet staff. It also covers

staff who have been authorised to work on a part-time basis. The government employees who are not bound by this principle are extremely rare, and consist mainly of staff for whom government employment is not a full-time job and, under a specific provision, research staff who develop the results of their research work.[5]

This prohibition no longer applies when officials are given a statutory status that allows them to engage in a private activity, *i.e.* if they take an unpaid leave of absence without entitlement to promotion or retirement benefits, or terminate their duties when they leave the administration permanently by retiring or resigning. Under this provision, the following are considered to be professional activities: any self-employed, commercial or salaried activity, whether it is permanent, temporary or even occasional, provided that it is "gainful". The exceptions to this rule are laid down by a regulation of 1936, which exempts the production of scientific, literary and artistic works and teaching directly related to an official's competencies.

This regulation specifies that members of teaching, scientific and technical staff may, with the authorisation of their superior, exercise a profession directly related to the nature of their duties, but it stipulates that in such cases, they are prohibited from acting as consultants, experts or legal council in cases in which their administration is a party, unless they do so on its behalf.

Consequently, staff may not become involved in commercial activities that might lead them to enter into commercial relations with their administration, nor may they assist a third part in taking action contrary to the interests of their administration.

The sanctions applicable in the event of failure to comply with these provisions are disciplinary sanctions, ranging from a simple warning to dismissal. It is difficult to obtain statistics on the number of disciplinary cases that have arisen in this field. Some administrations have staff with a status that enables them to take advantage of the exceptions allowed by the decree of 1936 while other staff cannot do so. This generates a feeling of unfairness that may lead superiors deliberately to ignore staff who do not comply with the rule prohibiting outside employment. The reduction in working time and the low levels of pay in certain administrations can only increase this risk of staff engaging in outside activities of which their superiors may be unaware or that they may not be willing to punish. Nevertheless, the principle of public servants devoting their professional activity exclusively to their duties remains a fundamental principle of civil service law that is well-known by public servants and, despite some violations, widely accepted.

The requirement of disinterestedness

The second statutory principle is the requirement of disinterestedness. The prevision in this regard is as follows:

> *"Public servants may not have, either directly or through a third party, interests in an enterprise subject to the supervision of the administration to which they belong, or related to this administration that are liable to compromise their independence."*

This provision reiterates the prohibition contained in the criminal code. This is not merely a useless repetition, for it ensures that public servants are better informed, since the general statute is a relatively brief document with which all members of staff are familiar. Furthermore, under French law, disciplinary law is separate from criminal law, and public servants may be sanctioned by their administration even if they have not been prosecuted for these acts or if the charges against them have been dropped by a criminal court, unless they have been acquitted by the court.

The field of disciplinary infractions is narrower, since it only applies to public servants, and not to accomplices unless they are also public servants, but the scope of incrimination is broader because a disciplinary infraction may be committed if civil servants have an interest that is "liable" to compromise their independence, whatever their duties, the nature of "liable" being left to the appreciation of the administration, under the supervision of the administrative judge. Furthermore, the statutes of limitations to which criminal prosecution is subject do not apply to disciplinary cases, so action can be taken against civil servants and sanctions imposed long after the acts were committed.

Specific rules

In France, a number of professions have codes of ethics. This is the case of architects, dental surgeons, physicians and midwives, pharmacists and veterinarians. These codes, which are approved by the government, define the professional responsibilities of the members of these professions, in particular with regard to relations with customers or patients and with the other member of the profession and the various ways of exercising the profession. These professions are organised into professional associations and failure to meet ethical requirements are sanctioned by the disciplinary bodies established within the association, which are mainly composed of peers. Sanctions can range from a simple warning to exclusion from the association, which disqualifies those excluded from practicing the profession.

These codes of ethics apply fully to any members of these professions that have civil service status. For example, civil servants who are physicians or

architects are simultaneously subject both to the statutory rules of the civil service and the rules of ethics specific to their profession.

For the rest of the public service, there is a single code of ethics formally approved by the Government, namely the Code of Ethics of the National Police, established by Decree No. 86-92 of 18 March 1986. This code contains a preliminary section on the missions of the national police that defines the general duties of the public servants in the National Police, the respective duties of police staff and management and lastly of the monitoring of the National Police. This code does not contain a specific provision on conflicts of interest, but in Article 7 it stipulates that police officials must behave with *integrity*.

After some hesitation, it was finally decided not to issue a decree establishing a general code of ethics for public servants, since, in most cases, the existing rules of ethics are of a high level and are the responsibility of Parliament, and these rules have also been laid down in the past in legislation that is still in force. It was felt that it would be useless to have the Government issue these rules again, and some even thought that this might weaken them.

Nevertheless, it was necessary to take steps to ensure that members of staff were informed of the ethical rules that guide them in their work. Consequently, a number of ministries, such as the Ministry of Public Works and the Finance Ministry, have consolidated the various laws, decrees and internal circulars in this field, which has enabled them to prepare one or more guides to ethics for the use of staff. This has provided a valuable opportunity to look more closely at the risks of breaches of ethics and "good practice" in order to make it possible to avert these risks, particularly regarding the prevention of conflict-of-interest situations. These guides take into account the real situations that public servants encounter in performing their duties and thus address the main problems that they may face. The guides are distributed to all relevant staff and are discussed in training sessions in order to make staff fully aware of these issues.

Movement of public servants to the private sector ("pantouflage"): a risk factor

Background and definition

In the 19th century, France underwent heavy industrialisation. Enterprises needed engineers, but the major schools of engineering (*e.g. École des Mines*, *École des Ponts et Chaussées*) had for a long time been run by the State. They provided remunerated courses for engineering students who then entered public service as mining or civil engineers. A special status was created for public servants wishing to work in industry, allowing them leave of absence before returning to their original civil service corps or resigning to

stay in the private sector. It was in key government departments that industry sought out the skills it required to expand.

Major expansion in the banking sector at that time also created a need for far more new young bankers than could be trained in-house, so the banks turned to the Ministry of Finance corps of auditors to find staff. The French Government agreed to let its auditors become the architects of modernisation and development in the sector. Here too, the law was amended to allow those with financial skills to contribute to the expansion of French banking, just as others had done for industry.

This is how the practice known as "*pantouflage*" developed, a slang expression originally confined to engineering students but now commonly used to designate the movement of public servants to the private sector. Those failing to complete the period of public service they owe to the state may even have to pay a penalty (to offset the remuneration received as students).

High-level engineering studies are still provided by state-run institutions; companies still do not train their own engineers, and so the situation persists. In the wake of the Second World War, it grew even more marked as senior civil servants were seconded to public corporations to oversee the reconstruction of France. The various legislative provisions enabled most of them to retain membership of their original public service corps, thus forging close ties between enterprises and the political/administrative machinery. By and large, the situation had a very beneficial impact on the country's reconstruction.

But once reconstruction was complete, the transfers continued apace as more and more public servants left for the private sector. The outflow was particularly high in the 1980s when several major enterprises, notably in banking and insurance, were nationalised while retaining some private activities. While almost all of these firms are now back in the private sector, most are still run by members of the leading corps of public servants, not all of whom have resigned from their public-service corps. In 2000, over one-third of France's 200 largest enterprises were run by members of the leading administrative corps.

Today, these transfers are judged more harshly than a few years ago, one view being that leaving a government department to work for a state-run enterprise or one that has links with central government may generate conflicts of interest. In 1996, the Council of State invalidated the appointment of a senior Ministry of Finance official as head of a financial institution in the competitive sector. Its decision was based on the fact that, as a public servant in the Ministry of Finance, this person had supervised a restructuring operation involving that institution, making the appointment a breach of Article 432-13 of the Criminal Code.

Instruments covering "pantouflage"

From 1946 onwards, successive public service rules and regulations began imposing restrictions on the movement of civil servants to the private sector.

The restrictions related either to the functions that could be exercised by civil servants temporarily leaving their government departments – on statutory "leave of absence"– or by civil servants who had resigned or retired from the service on a permanent basis. These were broad instruments, some of which left the list of prohibited functions to more detailed regulations, but these did not materialise. In fact, the issue of civil servants moving to the private sector was not a sensitive one and the absence of detailed rules failed to raise much interest.

There has recently been quite a shift of opinion amongst the French public and politicians on this subject. A considerable turning point came in the early 1990s. A number of enterprises run by former civil servants were experiencing serious economic difficulties, and this did much to challenge the model that had been so effective during the post-war period.

In 1990, following a seminar on public service renewal, a decision of principle was taken to control the departure of civil servants for the private sector. The following year, a decree was passed specifying the scope of the prohibitions and providing for the intervention of an advisory commission when a government department intended to try to block the departure of a member of its staff. In 1993 came legislation establishing the commission and its role. By 1994, the legislation had already been tightened up: three commissions were set up, one for each section of the public service, and it became mandatory for officials to consult them before moving to the private sector for any reason. The commissions began meeting in March 1995.

Finally, two decrees were passed in 1995. The first specified the private activities that public officials, or public officials leaving the administration on a temporary or permanent basis, were prohibited from conducting. The second decree extended prohibitions to officials without tenure.

The prohibitions fall into two categories:

- The first reiterates the prohibitions set out in the Criminal Code: public officials who leave the public service permanently or temporarily may not work for an enterprise which, during the previous five years, they have controlled or supervised, or with which they have negotiated or signed contracts on behalf of the public authorities. As in the Criminal Code, the prohibition also covers public corporations doing business in the competitive market. The prohibition also extends to enterprises in the same group, the minimum stake being 30%. The prohibition applies for five

years following an official's permanent departure from the civil service. In the event of temporary leave of absence, it applies for the full duration of that leave.

- The second category is more recent. Public servants are prohibited from exercising a private activity if, by its nature or the conditions under which it is exercised, it undermines the dignity of their former administrative duties or might compromise the normal operation, independence or neutrality of the department. The duration of the prohibition is the same as in the first category. These provisions have been phased in gradually. This has been done in the HRM units of individual government departments, rather than by establishing a central department specialising in ethical issues. The main players where implementation is concerned are the Ethics Commissions established by the legislation.

D. Ethics commissions

Membership and procedure

Membership

As specified above, the public service in France has three Ethics Commissions, set up in 1995. The country's public service is in fact split into three – the central government public service, the territorial authorities and the public hospital sector – and each has a commission dealing with applications from officials in that part of the service. All three commissions report to the Prime Minister, which indicates their importance to government but at the same time their independence from government.

The membership of each commission varies, depending on the public service it covers. Each commission is chaired by a member of the Council of State and there is always one member from the Court of Auditors, plus three qualified persons. These members are appointed by decree for a renewable period of three years. The Government intended the commissions to provide scope for constructive discussion reflecting the realities of public-service work and the challenges facing public service, hence the inclusion, along with members from the Court of Auditors and qualified persons, of serving government officials, namely:

- The head of the central government public service department most closely concerned by the commission's work, which in fact acts as the commission secretariat, *i.e.* the General Directorate for Administration and Public Service (for the central government public service); the Directorate for Hospitals (for government employees in the hospital sector), and the General Directorate for Regional and Local Authorities (for the territorial authorities).

- The authority empowered to appoint the public servant submitting the application.

These members may take part in the proceedings personally or be represented by a subordinate. The Ethics Commission covering the territorial authorities has an additional member to represent associations of local elected representatives.

The presence of serving government officials has proved extremely beneficial, enabling the commissions to be fully informed as to how the relevant public service operates but also facilitating the dissemination of the commissions' opinions throughout government as they are announced. There is evidence that persons sent to the commission by government departments are closely involved in the discussions and determined to raise staff awareness about ethical issues, in particular the precautions required to prevent conflicts of interest.

Procedure

Cases are normally referred to the commission by the administrative authority employing the official who wishes to exercise a professional activity in the private sector while on leave of absence or upon permanent departure from the civil service. Exceptionally, however, officials may also refer their own cases to the commission in order to prevent any delay due to conflict with their department regarding the appropriateness of their departure.

One month after referral of the case, the Ethics Commission is deemed to have given a favourable opinion. The two commissions for the territorial authorities and the hospital service have used this procedure for more straightforward cases, unlike the commission for the central government public service which, with very few exceptions, has never done so.

This very short time limit ensures that professional plans are not held up by the need to seek the opinion of an administrative commission. This has helped to promote acceptance of the Commission among all the stakeholders.

A case file referred to the Commission by the administration must include:

1. The official's application, giving details of former public duties and the private activities the official intends to exercise, plus an affidavit to the effect that he/she has never controlled or monitored the enterprise in question, nor signed contracts or issued opinions regarding contracts signed with that enterprise.
2. An assessment form completed by the administrative authority for whom the official works, indicating whether or not, in that authority's view, the planned activity might be incompatible with the official's former duties.

3. The regulations and other instruments pertaining to the official's public-service corps, together with the statutes of the private entity the official is planning to join.

The case file is then forwarded to an independent *rapporteur*, who contacts the applicant and his/her superiors to investigate the request for an opinion.

This meeting is vital, as it provides the commission with detailed information on the official's plans, as well as being an opportunity to discuss the case with the person concerned. The meeting may reveal conflicts of interest when officials have controlled or supervised the enterprises they are planning to join, or have been involved in procurement. The person is then informed that the commission is bound to give an unfavourable opinion, since the planned activity is prohibited and would even make the official liable to criminal prosecution. If the meeting reveals that the conditions under which the official is planning to exercise the activity might compromise the normal running of the department, in particular by generating conflict-of-interest situations because of the special relationship between the official and his/her former department, then the *rapporteur* must enlighten the official as to the changes required to make the move compliant with ethical regulations.

When a case file poses such serious problems that the commission is bound to give an unfavourable opinion or a favourable opinion subject to conditions which will radically affect the official's plans, the person is invited to comment. In such difficult cases, this final discussion is very important. Not only does it give officials a chance to air their views but, more importantly, it enables the commission to set out the principles behind its decisions. Even today, some government departments receiving few staff applications to move to the private sector know little about conflict-of-interest prevention. Studying the case file is an opportunity for them too to become more aware of the law.

Eventually the commission deliberates, but the *rapporteur* does not take part in the vote. Officials are informed of the commission's opinion by their departments. The commission merely gives an opinion and that opinion relates solely to ethics. It has no bearing, for instance, on whether a departure raises problems because the official will not be replaced, or whether the planned activity may compete with the gainful activities of their former department.

The administration is never obliged to follow the commission's opinion, and may justify an unfavourable opinion on other than ethical grounds. For instance, it may turn down an application for leave of absence or early retirement – when not a matter of right – on the grounds that public service needs to be maintained, if the official cannot be replaced immediately. The applicant's department must inform the commission of how it intends to act

on the opinion. It almost always complies. Reports show that the commission's opinion is followed in virtually every case.

The legislation establishing the three commissions requires them to submit an annual report to the Prime Minister. Every year a report is submitted; it is then circulated to the departments involved, thereby enabling them to keep their officials better informed and gradually increasing the visibility of the commission's opinions.

The three Ethics Commissions give some 5 000 opinions a year in all. In 2002 the commission for the central government public service dealt with some 900 cases relating to the 1995 Decree. The ratio of cases to staff in the central government public service in 2002 was 4.64:10 000, down from the 2001 figure of 6.3:10 000. Apart from this downturn in 2002, the Ethics Commission for the central government public service and the other two commissions have seen the number of cases rise steadily since they were established. There is now a greater awareness of the commissions and the need to refer cases to them. Most applications are from officials wishing to move out of public service to the private sector for a few years, on statutory leave of absence.

A strikingly low percentage of applications are received from retired civil servants. For a period of five years after leaving their post, they must apply for an authorisation to work in the private sector. As the retirement age is set at 55 in what are known as the "active" public service corps such as the police or some sections of the teaching profession, one may well wonder why there are so few applications. One likely explanation is a lack of information about the obligation they are under and the penalties for failure to comply, particularly where retirement pensions are concerned.

Analysis of the origin of referrals by government department shows the majority of them to be from the Ministry of Finance and the Ministry of Public Works. This is hardly surprising in that public service staff working for both ministries have the kind of financial or technical skills that have always been sought after by private companies. Many referrals also come from the National Employment Agency, an institution set up to assist job-seekers, where many staff want to gain more diversified experience in associations or other parts of the social sector. Finally, many of the applications also come from regulatory bodies such as the COB (*Commission des opérations de bourse*, which regulates the stock exchange) or the AFSSPS (*Agence française de sécurité sanitaire des produits de santé*, which regulates healthcare products). These give contract work to staff from private enterprise who, after spending some time with the agency, wish to return to the private sector.

More than half of all applications are from senior civil servants and over 10% are from staff without tenure, although these are a small minority in the central government public service.

A study of the fields of business that former public servants are entering reflects the situation in the economy as a whole. For several years the new technology and telecommunications sector, for instance, was a popular destination. But after the crisis in the new technology industry, this now accounts for only a small share of all applications to leave. Increasingly popular is the legal profession – many civil servants, particular tax officials, want to become lawyers – as well as construction and civil engineering. In each of these sectors, action is clearly required upstream to avoid any suspicion of conflict of interest. Lawyers should not build up their clientele by suggesting that they carry influence with colleagues in their former department; construction companies should not ask favours of a public works official in exchange for the promise of a job; nor should it be conceivable that a company will be treated better if it employs a former public servant.

Precedents

Types of opinion

The opinions of the Ethics Commission seldom confirm incompatibility (1.59% in 2002). From the outset, the number has always been low. In most cases, they concern applications from public officials who have controlled or monitored the enterprises they are planning to join, or who have negotiated or signed contracts with them. The low percentage stems from the fact that most government departments are familiar with the Criminal Code and manage to persuade their staff not to make any plans that would breach it. But when such a case does come before the Ethics Commission, it always confirms incompatibility, the principle being that there can be no margin of discretion in such cases.

But the commission frequently (in 15% of cases) gives favourable opinions, subject to conditions. These conditions are a way of avoiding a declaration of incompatibility for plans that would only raise problems in certain areas or under certain circumstances. In practice, conditions are a means of prohibiting officials from exercising functions in those areas (usually those falling within the competence of their former department) or under specific circumstances (which usually include contacting their former department, following up dossiers formerly dealt with in the department, or providing consultancy services for persons audited by their former department). The preventive aspect of these conditions is very marked.

This practice was developed by the commission from the outset. For specific administrative functions which the commission is often called upon to address, *e.g.* the work of the police, or tax officials, it is now possible to draw

up a list of conditions pertaining to that function. Public employees working in such fields are informed about them by their departments and can make their plans accordingly. This is systematic practice for tax officials intending to practise law, for instance. Officials submit their plans along with a prior undertaking to comply with a condition similar to that imposed by the Ethics Commission in the past.

Assessing the merits of a case

The Ethics Commission's opinions help to give public servants a clearer idea of what constitutes conflict of interest.

First, they clarify the scope of this notion. On many occasions the commission has defined an enterprise as any legal person, regardless of structure, exercising an economic activity in a competitive sector. This covers not only companies (which are established for profit) but also associations (a legal structure which is normally non profit-making) and public law corporations, including public authorities which, although attached to public entities, operate in the competitive sector.

It does not cover legal entities exercising a disinterested activity, in particular associations working with the deprived but also unions (including employers' unions) and political parties. With regard to the latter, the commission considered that its remit did not include verifying compliance with the legislation on party-political funding, and consequently that it was not concerned with possible links between parties and public authorities with regard to the recruitment of public officials by political parties.

Also excluded are public corporations which exercise an economic activity but are statutory monopolies. In the absence of competition, the commission considers that the recruitment of a public official by such public corporations does not constitute undue advantage (*prise illégale d'intérêt*).

Finally, as we have already seen, the notion of enterprise in the relevant legislation covers all of the enterprises in a single group. In other words, the commission's view, in accordance with the law, is that the prohibition extends beyond any company controlled by the official to encompass the parent, daughter or sister company of the enterprise concerned, subject to the provision regarding a minimum stake. Even without sub-subsidiaries, the scope of the prohibition is therefore very wide, particularly in some sectors such as public works or the environment, in which there are major groups with numerous subsidiaries.

The definition of the functions prohibiting recruitment by a private company are characterised by the fact that the commission keeps to the letter of the law. It looks at whether the official's actual duties required them to control or monitor the enterprise, and whether they were involved in

procurement. This literal interpretation of the law disregards the official's level in the hierarchy. This approach is not always well received, as it is may be very severe towards government employees at a relatively low level in their department, for instance site inspectors called upon to check measurements or certify performance, or laboratory technicians testing samples for the allocation of subsidies or the selection of service providers.

But the realities of local life show that such severity is warranted, that prohibitions should be forcefully asserted and enterprises informed to prevent them from offering jobs to officials who have had occasion to witness their performance or sign contracts with them, which would only cast doubt on the conditions under which the controls were carried out or the contracts signed.

Higher moral standards warrant better information; while this kind of recruitment is unacceptable, it is also most untoward for officials to be left in a state of uncertainty, only to find their plans to join the private sector come to nothing when their case reaches the final stage of the Ethics Commission procedure. Fortunately, there is evidence that government departments are better informed and, in turn, usually manage to keep their staff informed.

When there is no control, monitoring or involvement in procurement, the commission endeavours to prevent the occurrence of potential conflict-of-interest situations by imposing the conditions mentioned above. The most common condition here is to prohibit all relations with the official's former department. Officials who have remained in touch with former colleagues could be used to obtain undue advantages; prohibiting all relations removes the temptation and also protects officials from employers who might ask them to act unethically.

One condition along the same lines prohibits former officials from dealing in the same type of activity as when in public service. Commonly imposed on officials wishing to set up their own consultancy, this prevents them from building up a client base during their period of public service but also, and more importantly, renders ineffective any promise made to them in exchange for advantages they may have granted to a firm in the course of their public duties.

Public sector research

The need for a policy to develop the findings of government research has prompted Parliament to introduce a special arrangement for research staff. Under exceptional circumstances, these employees are authorised under the 1999 Act to have interests in private companies linked with their department (in practice the research institution or university employing them).

The research staff are authorised:

- to act as partner or manager in setting up a company with a view to developing, under contract to a public institution or authority, the research work they have conducted in the course of their public duties; or
- to provide scientific assistance to a company which, under contract to a public entity or public corporation, develops the research work they have conducted in the course of their public duties and, where appropriate, to take a stake of up to 15% in that company; or
- to sit on the board of directors or the board of trustees of a limited company with a view to promoting the dissemination of public research. The official concerned is not authorised to take part in any negotiations between that company and the contracting public institution.

The authorisation is subject to a favourable opinion by the Ethics Commission of the central government public service. This special arrangement was initiated in 2000. It is generating a growing amount of work for the commission. While it does safeguard the basic principle, *i.e.* an official may not participate directly in negotiations, it is clear that the status of research staff is highly exceptional compared with that of other public servants.

This exceptional status is warranted by delays in the development of French research findings, owing to the fact that French government work is often basic research and private firms are unwilling to take risks at the intermediate phase between theoretical discovery and industrial applications. By authorising the recruitment of the researcher behind the discovery, Parliament felt that the situation could be improved.

There is a great need to put conflict-of-interest risks into perspective. Many of the firms concerned are very small. In the early years, their business is more of a gamble than a real profit-making concern. And very few of these companies eventually break even on their own; as soon as they meet with some success, they are taken over by investors with financial resources out of all proportion with the initial investment, and the researcher's stake, which may have been a large share of the seed capital, is very small by comparison. This mechanism should also be compared with the system that pays back to patent owners a percentage of the licensing revenue from patent rights. This is another incentive to disseminate the findings of basic research, warranted not by the researchers' own interests – even if they do derive some gain – but by the general interest.

E. Conclusions

Since the 1990s, preventing conflict of interest has been high on the French government agenda. For public servants, the legislation has been revamped, enforcement stepped up and new institutions established to play a

preventive role. Public servants are being made increasingly aware of these issues and appear determined to comply with ethical requirements. The concern is shared by society at large, and recent legislation has been introduced to prevent conflicts of interest within private companies, laying down specific rules on the adoption and reporting of board of director deliberations which cast doubt on the interests of one of the company's managers. Consequently, there is now heightened awareness throughout the country as to the importance of preventing conflict of interest.

Notes

1. Approximately 76 225 euros.
2. The Le Robert Dictionary defines "*pantoufler*" as follows: "To leave the service of the State (if necessary after paying a penalty) in order to work in a private company".
3. Approximately 30 490 euros.
4. The official web site of the *Commission de la transparence financière de la vie politique* can be found at *www.commission-transparence.fr*
5. See the description of this system at a separate section at the end of the chapter.

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Managing Conflict of Interest in the Public Service
OECD Guidelines and Overview

Building a Coherent Framework at the Federal Level: The German Experience*

* This chapter was elaborated in co-operation with Dr. Manfred Späth, Deputy Chief of Division and Birgit Laitenberger, Head of Division in the Federal Ministry of the Interior.

A. Summary

When the public administration has gone through substantial restructuring aiming at more efficient and effective forms of organisations and administrative methods, the behaviour of public officials becomes increasingly like that of business managers. In this context, the specific criteria of public administrative behaviour such as respecting the public interest and serving the public welfare, impartiality and the rejection of any kind of personal unjustified advantage must be intensively re-emphasised and inculcated. Although there is no general definition for conflict of interest, a number of regulations, including primary and secondary legislation as well as non-legal documents, pronounce principles and rules for avoiding situations of conflict of interest. Furthermore, complementary mechanisms have also been upgraded to ensure that public officials comply with these core public service principles and rules.

In Germany, laws and legal and administrative regulations are the core instruments that explicitly define official obligations for both civil servants and employees in the public service. However, the comprehensive legal framework is not isolated: it has been effectively supported by preventive measures. In daily practice, equal emphasis is put on these necessary supplementing measures, particularly on training and counselling but also on periodic awareness-raising, in order to effectively ensure that individual measures are integrated in a coherent and comprehensive system.

B. Constructing a framework for preventing conflict of interest

Civil servants

Laws are the key instruments to provide clear-cut clarification of both prescribed and prohibited behaviour in the public service. In the implementation of these laws, any uncertainties in the interpretation of general definition should not be the responsibility of the officials. For the **civil servants**,[1] the regulations are the primary source for setting standards to avoid conflict of interest: civil service laws lay down key principles and various obligations for both the federal level (in the Act on Federal Civil Servants) and the state level (in the corresponding *Länder* Statutes on Civil Servants). Fundamental principles include:

- Full dedication to the profession as a civil servant.

- Impartiality and selflessness.
- Restrictions on political activities.
- Permission required for the acceptance of gifts connected to public office.

In addition to the civil service laws, conflict-of-interest rules referring to a particular concrete situation (for example *awarding contracts*) can be found in both secondary legislation and non-binding government documents, such as:

- The multiple-presence principle that requests the separation of planning, awarding of contract and settlement of accounts in the public contract awarding process and requires different officials to take part in the successive stages.[2]
- The definition of a circle of persons who are excluded from the decision-making process because these persons (such as bidders, applicants, their employees and dependants) are considered to be biased and for that reason are not permitted to co-operate with a client in the awarding of contracts.[3]

Public employees

For employees in the public service, the main sources that define the rights and duties to avoid conflict of interest are the respective individual employment contract, the collective agreements and the general labour legislation.

In addition to the primary source (laws), textbooks, special papers on the regulations concerning public office and collective agreements and the commentaries of regulations on official duty and collective bargaining law provide information for public officials on their rights and duties. These are also listed and explained in non-official documents, such as published information materials available for the general public within the framework of public relations activity of the Federal Government. The new information and communication technology plays a crucial role to make this information widely available.

The public service basically participates in the conceptualisation and implementation of these regulations in two ways through: the continual handling of these problems in the trade unions and the professional associations and through the requirements of and experiences in the individual administrations and areas of work. Participation of the wider public is provided by relevant parliamentary enquiries concerning the efficiency of corruption prevention. The Federal Audit Office is an additional controlling instance that provides reports to the Federal Parliament while state-level Audit Offices fulfil the same function at the *Länder*.

C. Laws elaborate on rights and duties

Civil servants

In line with the concept of public duty, laws describe those specific rights and duties that preclude potential conflicts of interest situations for civil servants in order to encourage high standards of conduct and counteract violations of duty. Some of the fundamental *obligations for civil servants* are the following:

- Obligation of full dedication to the profession as a civil servant.
- Limitation of the opportunity for involvement in outside activities.
- Obligation of impartial, fair and loyal fulfilment of the duties of public office orientated towards the common welfare.
- Obligation to fulfil the duties of public office selflessly and to the best of one's knowledge and conscience, including the obligation to decline any rewards or gifts.
- Obligation of official secrecy.
- Duty of obedience: civil servants are fundamentally bound to the instructions of their superiors with the exception of the obligation of remonstrance in cases of illegal official instructions from a superior.
- Obligation to advise and support one's superiors, especially in matters concerning the legality and appropriateness of his/her official activities including the obligation to make him/her aware when the measures intended thereby are inappropriate or even illegal.
- Obligation to carry full personal responsibility for the legality of one's official activities, with the consequence that one is accountable for illegal official acts, which may result in punishment, disciplinary action and/or legal liability, even when the illegal official act has been sanctioned by a superior.
- Obligation not to strike, in order to guarantee the functioning of the administration at all times in the interest of the community as a whole.
- Obligation of behaviour which commands respect at all times, whether in the capacity of public service or outside.

In addition to their obligations, civil servants also have specific *rights* to support a working environment that excludes and/or reduces the potential of conflict of interest for civil servants. These include:

- The principle of life tenure that ensures the independence and neutrality of the state administration. According to this principle, apart from retirement when the legal age has been reached or discharge on own request, removal from service is only possible in exceptional cases expressly named by the legislator, for example as a disciplinary measure or unfit for service.

- The maintenance principle: public officials should receive the appropriate salary and pension in keeping with their office – including the corresponding training programme. Under this principle, public officials can dedicate themselves to their life profession with financial independence so that the susceptibility of corruption motivated by the safeguarding of one's livelihood is out of question.
- The right to the appropriate use of office: thus securing an administration which is independent of political power struggles and conflict of interest.

Public employees

Apart from the obligations which are also valid for employees in the commercial sector, specific obligations are laid down for employees which result from their activity in and for the public service such as:

- Vow of conscientious fulfilment of official duty and observance of the laws.
- Adherence to instructions, unless an instruction is recognised as being contrary to criminal law.
- Duty to observe secrecy.
- Fundamental prohibition of the acceptance of rewards or gifts.
- Limitation of the opportunities for involvement in outside activities.[4]

On the other hand, employees in the public service also enjoy specific rights. One of their rights is that their position is protected after 15 years in public service after age 40, unless there are reasons for an exceptional dismissal, such as especially serious misconduct.

Members of the Government

In addition to the general standards that are applied to both civil servants and employees, some *additional requirements* have been developed for political positions: Ministers and State Secretaries at the federal level. While members of the Government at federal level and the Parliamentary Secretaries of State should fundamentally apply the same standards of conduct as prescribed for civil servants (whether by law or by analogy) they are further forbidden to be involved in any outside activities, regardless of how negligible these may be. Laws expressly prohibit the following, during the tenure of their office:

- Occupying another salaried office.
- Practising another vocation or profession.
- Belonging to the board of a profit-making company.
- Belonging to the supervisory board or administrative board of a profit-making company, unless the *Bundestag* (for Federal Ministers) and/or the Federal Government (for Parliamentary Secretaries of State) have expressly granted permission for an exception to be made in individual cases.

- Carrying out of a paid activity as an arbitrator or a consultancy activity outside the courts.
- Holding of a public honorary post, unless the Federal Government has expressly granted permission for an exception to be made in individual cases.

The Ministers and Parliamentary Secretaries of State at federal level are also obliged to give notification to the Federal Government of gifts they receive in connection with their official position. The Federal Government (for Federal Ministers) and/or the responsible member of the Federal Government (for Parliamentary Secretaries of State) make decisions concerning the use of such gifts.[5]

For civil servants and employees who carry out a function at the political-administrative interface, the same standards of conduct have to be applied as for other officials of their status group. However, they can be put into temporary retirement at any time without a declaration of the reasons for this.

At-risk area: private activities

The German Civil Service Law assumes that basically any *private activity* at the same time as the main employment can impair the official in the fulfilment of public duties (particularly the principles of complete dedication to office and impartial exercising of duties) and can thereby result in a conflict-of-interest situation. In order to avoid potential conflict of interest, private outside activities while working in the public service are permitted only with strict restrictions. These restrictions are enumerated in the law for civil servants, judges and soldiers, and in the collective agreement for employees in the public service. In principle the following measures are taken equally for all groups:

- Outside activities require the expressed permission of the employer before they may commence; the length of permission is limited to five years maximum.
- Outside activities that are subject to permission will be automatically refused if the mere danger of impairing operational interests exists. This danger is especially evident when consequences for the functioning ability of the administration and its reputation, the impartiality and freedom from bias of the public official cannot be excluded or if the public official is too heavily involved in the outside activity, *i.e.* more than eight hours per week on average.
- In order to reach a just decision about the permission it is required to disclose information on the expected payments and monetary advantages, the type and extent of time required as well as the name of the client and/or employer of the outside activity that requires the permission.

- In every single case it will be verified whether the activity – especially with regard to its extent – can be reconciled with operational interests. If there is even the slightest hint of the danger of a conflict of interest, the permission will be refused.

Only certain outside activities which, due to their nature, do not give rise to an expectation of conflict with operational interests or which enjoy constitutional protection do not require permission. These include activities in trade unions and in professional associations of the officials as well as the freedom to practise art, science and lecturing. They can only be prohibited if it has been established or is almost certain that the civil servant will fail to comply with his operational duties due to the outside activity. However, notification must be given in advance if these outside activities are exercised for financial gain.

Certain activities that are in the public interest are privileged in the sense that they are completely exempted from the regulations for outside activities. This applies for instance to public honorary offices.

The observance of these regulations is ensured by the obligation to inform the employer about outside activities – including those which do not require permission – if the employer asks.

In addition to secondary employment in the private sector, the possibility of conflict of interests is especially assumed if *gifts* or other advantages in connection with the respective office are accepted. Therefore this is only allowed in exceptional cases and within strict limits.

Moreover, special provisions apply for public officials in areas of work that carry a potential risk of corruption, such as awarding of contracts, customs and excise administration, tax administration and the judiciary.

D. Putting laws into practice

Disclosing potential conflicts is a key obligation of civil servants and employees in the public service:

- *Immediate disclosure* of any circumstances that can be the cause for bias in connection with the fulfilment of an operational duty.
- *Prior disclosure* of gifts that it is intended to be accepted. The acceptance of gifts is permitted as an exception only.

For the commencement of *outside activities*, the following applies:

- The basic circumstances of an outside activity that is subject to notification or permission – *i.e.* the type, the extent, the expected amount of money that will be earned, and name of the client – must be disclosed prior to commencement.

- Immediate disclosure when one of the circumstances mentioned above changes.
- Payments for a secondary outside activity in the public service must be disclosed annually if they exceed € 500 (gross) within a calendar year. This provision is specified in the legal regulations which require the declaration of such secondary activities in order to prevent double maintenance through public finances.

The employer office of the civil servant plays a crucial role in the daily management of preventing and resolving conflict-of-interest situations. The responsibility of the employer to decide in cases of application for permission for outside private activities is the key controlling function. In addition, the employer must be notified in advance about:

- Those outside activities that do not require permission and are not paid.
- Private activities of retired officials which have a connection to their former activity in the public service and which have to be refused if necessary.

The employer grants extra leave for private activities only if the absence is in the interest of the office or at least the public. When the employer refuses an application for permission, public officials can apply to courts for remedy.

When a public official infringes the regulations, he/she can face a wide variety of sanctions that may include both disciplinary measures and criminal prosecution. If a *civil servant or judge* commits an official offence with the consequence of a disciplinary action, the result in the most serious case is removal from office, or in the case of retired officials or retired judges, the loss of their pensions. Disciplinary regulations determine the proceedings for civil servants at the federal level[6] that include the following measures:

- If facts become known which justify suspicion of an official offence, the superior official must initiate official disciplinary proceedings in order to clarify these facts. The disciplinary proceedings must examine both the incriminating and the exonerating circumstances as well as those facts that are significant for the determination of the disciplinary measure.
- The specific elements of the proceedings (such as notification, instructing, hearing of evidence) are defined in detail by the legal regulations. If the superior official does not dismiss the proceedings after the fact-finding has been concluded and if he/she regards his/her disciplinary competence to be sufficient, he/she will release a disciplinary decree that can only impose:
- Censure: reproaching certain behaviour.
- Fine: that must not exceed a monthly salary; or
- A cut in salary: a proportional reduction of the monthly salary.

- If the superior official regards his/her competence as insufficient, he/she will instigate the decision of a higher superior official or the highest official authority. In the course of the disciplinary action, the disciplinary courts can also adjudge as to the remaining measures listed conclusively by the law:
- Downgrading ("demoting").
- Dismissal from civil service status: with the connected consequences of losing the salary, the entitlement to a retirement pension and the privilege of holding titles connected to the office.
- Deprivation of the retirement pension (this applies to retired officials instead of dismissal from civil service status).

The lodging of a protest against a disciplinary decree[7] is admissible – as is usual in any other administrative proceedings. A legal process in the administrative courts against a disciplinary decree in the form of a notice of protest is possible – as is usual in any other case too.

Outside of the disciplinary proceedings – in fact, often prior to the commencement – the civil servant can be prohibited from carrying out his/her official business due to imperative official reasons. The authority which is responsible for the initiation of the disciplinary action can suspend an official from service if, in the course of the disciplinary proceedings, the removal from civil service status can be expected as judgement or if the keeping of the civil servant in service would substantially impair the official operation or the fact-finding. Parallel to the suspension or later, the authority which is responsible for the initiation of the disciplinary action can demand that a part of the respective salary of the civil servant (half of it at most, and 30% of the pension at most in the case of retired civil servants) can be retained. This, however, is only admissible if the probable removal from civil service status will be adjudged.

For *employees* in the public service, there are no regulations which could be compared to the disciplinary law for civil servants. Here the same sanctions apply which are provided in the general labour legislation such as an official warning, notice of termination and, in the case of grievous violation of duty, the extraordinary notice of termination (with immediate effect).

Independent of the status of a civil servant, judge or employee in the public service, a public official can be sentenced *additionally* to a fine or even imprisonment by a criminal court if he/she has violated an official secret while carrying out a private activity or if the private activity was accepted in return for certain official behaviour or in expectation of such behaviour, thereby representing the offence of corruption.

Training is the major tool to inform public officials on the principles and rules for avoiding conflict of interest; however the principles and rules are also included in the entrance examination. Within the framework of their specific pre-service and in-service training in, civil servants receive instruction about the principles and measures for the avoidance of conflict of interests. Providing an understanding of the central values of public service as the principle of governmental activity is the fundamental basis for the training of all civil servants for all careers and career categories. The ethos of the civil service law is an integral part of the entire training course and is not restricted to certain parts only. During the pre-service training course for the executive service in the federal administration, special parts of the training course are dedicated to the self-image of the civil servant, to social behaviour, to communication and management, to competence in grass-roots administration, as well as taking responsibility, making decisions and acting on one's own initiative.

The *employees*, if they have not been trained by the public service, should receive information on important legal regulations. This information must be made available by the employer in their office at the latest when they have taken up their position.

In *further training programmes* of civil servants and employees, these values are taken up again and are dealt with using current situations and problems as examples. Main aspects in the training programme focus on the provision of an understanding of the principles of co-operation, management, social competence and responsible behaviour in the execution of official duties. For example, the training programme makes use of concrete cases of conflict that have come to light in current assignments of the administration. The relevant recommendation of the Federal Government[8] contains a "Behavioural code against corruption" which draws the attention of the employees towards potentially dangerous situations, in which they may become involved unintentionally. Furthermore, civil servants are encouraged to fulfil their tasks in a dutiful and law-abiding manner, and training makes apparent to them the consequences of corrupt behaviour. All ministries and other authorities have made this code directly known to their employees, either in digital form or in printed copy, and other employers are also planning to do so.

In cases of doubt, the public official is obliged to obtain more information in order to make sure that his/her behaviour is legally correct. The following persons are available for information:

- Superiors.
- Members of the personnel department.

Problems of ethics resulting from carrying out specific tasks must exclusively be solved in an official manner, *i.e.* through consultations with

superiors, if necessary by way of remonstrance. In every other respect, the superior must also create general conditions for a trustful relationship which allows room for raising and discussion of questions and dilemmas related to conflict of interest. Managers and immediate superiors should also provide an exemplary role through their own behaviour in all matters.

A Government directive[9] provides for a contact person in matters of corruption prevention. This position has already been introduced in most administrative departments and recipients of allowances. In most cases, the authorities have entrusted the responsibility for this task to a senior civil servant of the central department (Manager of the Budgeting or Organisations Department, Manager of the Legal Department or the Internal Auditing Department). In some cases, however, members of specialist departments in the authorities or the recipients of grants and in some cases also non-executive civil servants, have also been appointed as contact persons.

E. Recent developments and emerging issues

Although a comprehensive, scientific examination of the effectiveness of the various measures for the control of private activities by public officials is not available, the effectiveness of the existing measures is nevertheless estimated to be high due to the considerable consequences which a public official faces for violations of expressed obligations. Obvious shortfalls are not discernible. Even in connection with the measures for the fight against corruption – due to the control mechanisms especially immanent to civil service law – it is less a matter of the introduction of new legal tools for public service, but more a matter of the firm use of existing tools and a further awareness-raising. The awareness has recently become stronger of the danger of potential influence on public officials planned over a long period of time. Consequently, a higher emphasis is put on informing officials of problems that relate to changed forms of corruption, such as “laying bait”: a planned course of action designed to create dependencies, which may not take on an illegal character until a later phase.

The international dimensions of corruption have also become more apparent. Corruption does not stop at borders, and administrations of single states have become more vulnerable. On the other hand, co-operation with other administrations, for example Europe-wide tenders (the awarding of contracts), provide for additional transparency in commercially relevant decisions by the public sector.

The Federal Government aimed to increase awareness by issuing a directive in 1998 for preventing corruption in the Federal Administration. Initial experiences show that this directive has strengthened awareness of the problem of corruption and has led to intense discussions as well as

encouraging preventive measures. Contact persons in charge of preventing corruption at the federal level regularly exchange their experiences and views. Based on the results of exchange of these experiences and their internal evaluation in the federal administration in 2002 and 2003, the Government Directive is being updated.

Furthermore, a new general administrative regulation to promote activities by the Federal Government through contributions from the private sector (sponsoring, donations and other gifts) provides the federal administration with basic principles and procedures for using sponsoring from the private sector.[10] This regulation also includes a list of examples for activities eligible for sponsorship.

In addition, the public procurement law is under revision to make the tendering procedures leaner and more efficient for preventing corruption.

Notes

1. The two major groups covered by this chapter are the **statutory civil servants** (*Beamte*) and **public employees** *(Angestellte des öffentlichen Dienste)*. In the Federal Republic of Germany the Basic Law (Constitution) and the Act on Federal Civil Servants determine the status of statutory civil servants (*e.g.* Article 33. Para. 4 of the Basic Law) while the conditions of employment contract for public employees working in the civil service are regulated by private law, including the general Labour Law and collective agreements.
2. This principle is included in a catalogue of recommendations declared by the Federal Government *Directive on Prevention of Corruption in the Federal Administration* issued on 17 June 1998 (see *www.bmi.bund.de*).
3. The definition of this circle of persons can be found in the Directive for the Awarding of Contracts (VgV). The exclusion principle is also included in the contracting regulations for performance (VOL).
4. This obligation refers to the Civil Service Law.
5. See paragraph 5, Section 3 of the *Law Concerning the Legal Circumstances for Members of the Federal Government* [BminG] and paragraph 7 of the *Law Concerning the Legal Circumstances for Parliamentary Secretaries of State* [ParlStG] together with the Cabinet's memorandum about the 63rd session on 20 November 1984 (point 6 in the agenda of the day).
6. Similar procedures can be applied for civil servants working at state level (in the *Länder*).
7. Paragraph 41 and following of the Federal Disciplinary Law – *Bundesdisziplinargesetz*.
8. Recommendation No. 8 of the *Directive on Prevention of Corruption in the Federal Administration* deals with the awareness-raising and instruction of employees.
9. Recommendation No. 5 of the *Directive on Prevention of Corruption in the Federal Administration*.
10. The regulation was signed by the Federal Chancellor on 7 July 2003 and it entered into force on 11 July 2003.

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Managing Conflict of Interest in the Public Service
OECD Guidelines and Overview

Managing Conflict of Interest in a Decentralised System: The New Zealand Experience

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A. Summary

New Zealand public servants pride themselves on being among the most honest in the world.[1] However, New Zealand cannot afford, and is not prepared, to be complacent about the ethical behaviour of its public servants. Any instance of corruption has the very real potential to undermine citizens' confidence in public institutions on a scale disproportionate to the offence. Many public functions in New Zealand (for example the tax system, benefit administration and a range of licensing and registration arrangements) rely heavily on voluntary compliance by citizens. That voluntary compliance depends in large part on citizens' perceptions that the public management system is fair, and that the people who operate it are honest and will not abuse their positions. It is important therefore that all New Zealand public servants behave, and are seen to behave, honestly and in accordance with a set of values that the public regards as appropriate for its paid officials.

New Zealand has developed principles-based conflict-of-interest policies that are part of a wider integrity-based ethics regime.

B. The legal framework

Because of its small size, New Zealand does not have the layer of provincial or state governments of other larger countries. For this reason, for example, New Zealand has only one Inland Revenue Department, Audit Office and Customs Service. Guidelines and procedures for managing conflicts of interest are therefore designed by each individual agency (and not by a central agency or "ethics office").

The New Zealand public sector comprises:

- Public Service departments within the legal Crown.[2]
- A diverse range of State sector organisations outside the legal Crown, most of which are governed by a board (or a single person acting as a board) that is appointed by a Minister, or in some cases elected; and
- Local authorities, outside the central State sector, elected by the public.

The State Services Commissioner is the primary steward of the values and standards of the Public Service, although chief executives of departments are ultimately accountable for the general conduct of their employees.[3] The Commissioner has a legal mandate to issue a Code of Conduct, under Section 57 of the *State Sector Act* 1988, to prescribe "... *minimum standards of*

integrity and conduct that are to apply in the Public Service". This Code of Conduct sets out the general principles and requirements that form the basis of the Government's conflict-of-interest policies – it is a minimum, principles-based document, supplemented as required by each department's own more detailed code or guidelines.

The Code of Conduct does not apply directly to board members or employees of public sector organisations outside the legal Crown. Although there is no common formulation or discernible pattern to the inclusion of specific clauses detailing conflict-of-interest policies for board members, some legislation establishing these organisations has such specific clauses. By way of example:

- board members of the Land Transport Authority must disclose any possible conflict of a pecuniary interest (*Land Transport Act* 1998, Schedule 1);
- local authority board members must not vote on any decision in which they have a pecuniary interest (*Local Authorities (Members' Interests) Act* 1968);
- board members of Crown Companies must register and disclose any material financial interest in any proposed transaction of their company (*Companies Act* 1993, Part VIII); and
- before being appointed to the board of a District Health Board, applicants must disclose to the Minister any conflicts of interest that they currently have or that may arise in the future (*Public Health and Disabilities Act* 2000).

In relation to their employees, these organisations are responsible for designing and implementing their own individual conflict-of-interest policies. While the Crown has no explicit, formal mechanism for directing how these employees should manage conflicts of interest, Ministers are able to express their requirements through other means, such as letters of expectation and by emphasising values and ethics in accountability documentation. In addition, many of these organisations can and do borrow from the conflict policies adopted by the Public Service.

C. The principle of openness

New Zealand's management of conflicts of interest (and public service values and standards generally) is premised on the assumption that citizens' trust in the institutions of government can be maintained only if there is open government and transparency of process.

Transparent appointment processes

The New Zealand Public Service operates a transparent appointment system. The *State Sector Act* requires almost all vacancies to be advertised, and appointments to be made on merit.[4] These requirements apply both to the

State Services Commissioner's appointment of chief executives, and to a chief executive's appointment of his or her own staff. Appointments within a department must be publicised internally and they may be reviewed at the request of any existing departmental employee. This regime avoids nepotism and secrecy, and enables management of other types of employment conflicts of interest.

Public access to official information

The *Official Information Act* 1982 establishes the principle that official information should be made publicly available unless there is good reason for withholding it. "Official information" is broadly defined to include all information held by public sector organisations or Ministers. Such information must be made available unless:

- One of the conclusive reasons for withholding applies – such as protection of the security of New Zealand or its economy (Section 6); or
- One of the twelve "other reasons" for withholding applies – such as the protection of individual privacy or the protection of the convention of "free and frank" advice to ministers – and there is no public interest in the release of that information which overrides the reason for withholding (Section 9).

The *Ombudsmen Act* 1975 provides another mechanism by which the appropriateness of any action taken (or not taken) by public servants can be investigated.

Government business is thus open to public scrutiny, with the consequence that conflict of public and private interest, on the part of officials or ministers, is more likely to come to light.

Disclosure of serious wrongdoing

While not designed specifically for conflicts of interest, the *Protected Disclosures Act* 2000 promotes the public interest by facilitating the disclosure and investigation of matters of serious wrongdoing in or by an organisation. It also protects employees who, in accordance with the terms of the Act, make disclosures of information about serious wrongdoing in or about their organisation. Serious wrongdoing includes unlawful, corrupt, or irregular use of public funds or resources; conduct that poses a serious risk to public health or safety, the environment or maintenance of the law (including the prevention, investigation and detection of offences and the right to a fair trial); conduct constituting an offence; or conduct by public officials which is grossly improper. If a particular conflict of interest met the definition of serious wrongdoing in the Act, the employee could make a protected disclosure to one of the designated "appropriate authorities" under the Act.

D. Dealing with conflicts of interest

New Zealand adopts a principles-based approach to the identification and management of conflicts of interest. There are no prescriptive definitions and there are few explicit rules detailing how conflicts of interest (or potential conflicts) are to be managed. The *Public Service Code of Conduct*, for example, sets out the general principles and provides the framework within which individual public servants are able to make informed judgements when faced with competing interests and conflicting values. These interests and values could be financial (*e.g.* company shares, partnership interests, investments etc) or non-financial (*e.g.* personal or professional associations, or family relationships). In this latter respect New Zealand's demographics are changing, with an increasing number of citizens identifying themselves as indigenous (of Maori descent) or of Pacific or Asian origin. Assisting and supporting employees to reconcile their family or community expectations with their obligations as a public servant is an important component of New Zealand's conflict-of-interest policies. For example, the Ministry of Pacific Island Affairs runs training sessions for Pacific public servants, helping them manage the potential conflicts between the obligations of their jobs and the expectations of their family and community.

Identifying conflicts of interest

"Conflict of interest" is defined in the *Public Service Code of Conduct* as:

*"… any financial or other interest or undertaking that could directly or indirectly compromise the performance of their duties, or the standing of their department in its relationships with the public, clients, or Ministers. This would include any situation where actions taken in an official capacity could be seen to influence or be influenced by an individual's private interests (*e.g. *company directorships, shareholdings, offers of outside employment)…*

… A potential area of conflict exists for public servants who may have to deal directly with members of Parliament who have approached the department in a private capacity."

In relation to boards and employees in the wider State sector, the State Services Commission published (in August 1999) the *Board Appointment and Induction Guidelines.* These Guidelines were a response to concern over the clarity of roles and responsibilities of boards and their employees. They include guidelines on conflicts of interest, and state that:

"*… The key question to ask when considering whether an interest might create a conflict is: does the interest create an incentive for the appointee to act in a way which may not be in the best interests of the Crown body? If the answer is 'yes', a conflict of interest exists. The existence of the incentive is sufficient to create a conflict. Whether or not the appointee would actually act on the incentive is irrelevant.*"

In relation to board members of Crown Companies, a conflict of interest is defined as a situation in which a board member is *"party to, or will or may derive a material financial benefit from"* a transaction involving his or her company (Companies Act 1993, Part VIII, Sections 138-139).

Avoidance and disclosure

Public servants

The *Public Service Code of Conduct* requires all public servants to observe the principles of fairness, integrity and impartiality in all official dealings. Public servants are required to disclose any conflict of interest, or potential conflict, before they commence employment and during employment if such a conflict arises. It will then be up to their employer (the chief executive of the organisation) to determine whether a conflict of interest exists and, if so, what course of action is to be taken to resolve it.

In particular, public servants are expected to:

- avoid giving preferential treatment (whether by access to goods and services or access to "inside information") to any individual or organisation with which the employee is involved;
- avoid any financial or other interest or undertaking that could directly or indirectly compromise the performance of their duties or the standing of their department in its relationships with the public, clients or ministers;
- avoid abusing the advantages of their official position for private purposes, for example they should not solicit or accept gifts, rewards or benefits which might compromise, or be seen to compromise, their integrity (where any such offer is made, the public servant is expected to report the matter to his or her employer);
- ensure that their participation in political matters does not bring them into conflict with their primary duty as public servants to serve the government of the day in a politically neutral manner;
- consult their employer before agreeing to stand on any public or voluntary body; and
- consult their employer before undertaking any secondary employment.

In addition, some public servants in senior or specialist positions may be subject to a "restraint of trade" provision in their employment agreement, which limits for a specified period (and to the extent the law allows) the employment they may take up after leaving their Public Service position. It is up to each individual employer to consider whether any such restraint is appropriate and to decide on the particular requirements.

Public servants who belong to a profession, such as accountancy, auditing or the law, are also bound by, and required to comply with, their professional ethical standards.

Ministers

Ministers of the Crown are obliged to ensure that no conflict exists or appears to exist between their public duty and their private interests. In order to identify the personal interests that might potentially influence decision-making, the *Cabinet Manual* requires all Ministers and Parliamentary Under-Secretaries to lodge an annual declaration with the Registrar of Ministers' Interests. This declaration, which is tabled by the Prime Minister in Parliament each year (and thus open to public scrutiny), is required to detail:

- remunerated directorships or employment;
- substantial minority or controlling interests in a business enterprise or professional practice;
- minority ownership of company shares or beneficial interests in a trust;
- ownership of all real property;
- holdings of mortgage or debt instruments;
- details of certain overseas travel and accommodation for the previous year;
- gifts received by virtue of office over NZD 500; and
- payments received for any outside activities.

In addition, ministers are required to ensure that staff and political advisers in their offices understand the principles governing the minister's role and the minister's relationship with public servants and entities in the wider state sector, and that they consider potential conflicts and take appropriate steps to avoid them. Like ministers, staff in ministers' offices must also take care to ensure that they do not improperly influence matters that are the responsibility of others. Where there is a possible conflict of interest (or the risk of a perception of a conflict of interest), the staff member is expected to notify his or her minister immediately so that the issue can be dealt with. The Secretary of the Cabinet is available for guidance.

Resolving conflicts of interest

How a conflict of interest should be resolved is a matter that is considered on a case by case basis according to the particular merits. This is a management responsibility, there is no separate "ethics office", but the State Services Commission is available to provide general advice to chief executives, board members and employees.

Some conflicts are simply unavoidable. The Board Appointment and Induction Guidelines, for example, recognise that New Zealand is a small country and that therefore there may be only a few individuals who possess the critical skills and experience required for some positions or appointments. As such, the potential for conflicts of interest may be unavoidable in a reasonable

number of cases. This reality may be the price of appointing the best possible people to public sector positions. Nevertheless, while a conflict of interest will not necessarily bar an appointment, the conflict must be managed appropriately with adequate measures put in place to protect the decision-making integrity of the organisation concerned and public confidence in it.

The general principle, as set out in the *Public Service Code of Conduct*, is that:

- Many conflict situations may be resolved simply by transferring a duty from the employee concerned to another employee not affected by the particular circumstances.
- Alternatively, the employee may need to restrict or abandon the interest or activity giving rise to the conflict.
- If these options are not practicable, or if they do not enable the matter to be resolved on a basis which the employee concerned is able to accept, then ultimately the option of resignation from the organisation may need to be considered.

The actual mechanisms that may be put in place to prevent potential conflicts of interest arising, and help resolve any actual conflicts that do occur, are wide-ranging. As suggested in the *Board Appointment and Induction Guidelines*, the mechanisms include, for example:

- declaration of interest;
- transfer of duty;
- restriction or abandonment of the personal interest;
- divestment (*e.g.* the individual agrees to sell any shares or other properties that have created the interest);
- increased transparency and scrutiny of decision;
- abstaining from voting or decision-making (*i.e.* the individual agrees that, in addition to declaring the interest, he or she will not participate in any vote or other decision-making process on related issues);
- withdrawing from discussions (*i.e.* the individual agrees that, in addition to declaring the interest and abstaining from the decision-making process, he or she will withdraw from any meeting or discussions about the interest);
- non-receipt of relevant information (*i.e.* the individual agrees that, in addition to declaring an interest and withdrawing from the discussion and decision-making process, he or she should not be given any information, including board papers, written or oral briefings etc, relating to the interest);
- agreement not to act (*i.e.* the individual agrees not to participate in any other action concerning the interest, *e.g.* signing documents that relate to the interest);

- blind trust assignment of pecuniary interests;
- declining gifts, benefits and hospitality; and
- severing connections (*i.e.* resignation).

Conflict-of-interest processes are particularly necessary in the area of contract management. The Auditor-General, in his *Good Practice for Purchasing By Government Departments* (updated in 2001 in the *Statement of Procurement Good Practice*[5]), discusses identifying and managing conflicts of interest for staff involved in contracting and procurement. The Auditor-General's staff use these guidelines when auditing departments, and raise any discrepancies they identify during the audit in their letter to departmental management. Depending on the materiality of the conflict, the Auditor-General may raise the matter with the Parliamentary Select Committee reviewing the department. In addition, in his September 2001 report on *Financial Conflicts of Interest of Members of Governing Bodies*, the Auditor-General provides helpful guidance to agencies on recognising and dealing with conflicts of interest.

The State Services Commission's *Board Appointment and Induction Guidelines* (referred to above) suggest that several types of conflict of interest are likely to mean that a candidate is not suitable for an appointment, or should resign if the conflict arises during the course of the appointment. These include conflicts of interest which are:

- unavoidable (*i.e.* the appointee cannot or will not divest him or herself of the conflicting interest);
- serious (in terms of the significance and/or value of the interest, and the appointee's circumstances); or
- pervasive (*i.e.* the conflict would affect so many of the board's decisions that management mechanisms are not practical).

In some cases the legislation establishing a State sector organisation will prescribe that a board member may be removed for a conflict of interest.

E. Responsibilities and penalties

Individual public servants are responsible for avoiding and managing (in accordance with a process agreed with their employer) any conflict of interest that involves them personally. Any breach of this obligation may result in disciplinary action, which may include dismissal, as determined by their employer.

The responsibility for dealing with a public servant who fails to disclose, or to manage appropriately, a conflict of interest sits, as do all management decisions, with the chief executive of their agency (the employer).

In relation to board members, Cabinet considers any declared conflicts of interest before making any appointment to a board. Should any conflict arise

during the term of the appointment, the board would be responsible for dealing with it (although the board may choose to consult the responsible minister over the matter).

Role of the State Services Commissioner

Under the State Sector Act 1988, the State Services Commissioner has a leadership role in ensuring that public servants carry out the business of government with shared values, high ethical standards and in a spirit of service to the community. A major component of the State Services Commission's work programme, therefore, relates to ethics and, in particular, the provision of guidance for public servants on conflicts of interest and other core values. As the organisation responsible for the production of the *Public Service Code of Conduct* and *the Board Appointment and Induction Guidelines*, the State Services Commission is available to advise public servants and board members about these matters.

Because awareness and understanding are insufficient unless they are reflected in behaviour, the Commission has adopted a model of encouraging and facilitating an environment whereby public servants:

- support the objective of an open and equitable democratic system that encourages participation with minimal coercion;
- are aware of values and standards that are necessary to achieve that objective; and
- are discussing, living and leading values and standards in their day-to-day work;

In particular, in relation to conflicts of interest, the Commission's aim is that all those involved in public management, whether elected representatives or officials:

- recognise the risks;
- declare and manage conflicts of interest in an appropriate manner;
- welcome public interest and act on allegations of misconduct; and
- practise zero tolerance.

Legal penalties

While New Zealand has focused on reducing the incentives for corrupt practice and creating an environment in which corruption is unlikely to take hold, there is provision for "bottom of the cliff" legal sanctions. For example:

- the Crimes Act 1961 makes it an offence to offer a bribe to, or accept a bribe from, a public official, judicial officer, minister, member of Parliament or law enforcement officer;

- the *Crimes Act* also makes it an offence for any official to corruptly use or disclose any official information for advantage or pecuniary gain, or to use official information pertaining to the security or defence of New Zealand;
- while the *Official Information Act* facilitates the public release of official information, it includes criminal sanctions for the release of official information other than in accordance with that legislation. Similar offences are provided for in the *Summary Proceedings Act;*
- the *Electoral Act* 1993 requires a State servant wanting to seek election to Parliament to stand down from his or her official position for a period of about five weeks prior to the election. The stand down is without pay, although the candidate can take any accrued annual leave. However, the chief executive of the candidate's employing agency can require the period of stand down to start earlier if the chief executive is satisfied that the candidacy will materially affect the ability of the individual to carry out his or her duties or to be seen as independent in relation to particular duties; and
- the *State Sector Act* makes it an offence to influence the State Services Commissioner in any matter relating to the employment of an individual chief executive, or a chief executive of a Public Service department in any matter relating to a decision about an individual employee of that chief executive.

F. Future work

Acknowledging that conflicts of interest are an ongoing management issue, the State Services Commission is developing training resources for Public Service chief executives and senior managers to use with their staff. The purpose of the Commission's work is to:

- increase the confidence of Ministers and the public that public servants know how to, and will, act ethically when faced with situations that involve a conflict of interest;
- deepen the level of understanding of public servants on how to identify and manage conflicts of interest;
- raise awareness of, and ways of managing, conflicts of interest so that public servants (and State servants) can seek positive solutions with the support of their department; and
- encourage dialogue among different population groups about what constitutes ethical behaviour for public servants.

The Commission's resource material on conflicts of interest will:

- build on (and complement) the successful launch in September 2001 of the revised *Public Service Code of Conduct* and its supporting "Walking the Talk" material;

- outline what is meant by conflicts of interest, and suggest how to behave in a way that avoids and /or manages conflicts of interest in an ethical manner;
- support Public Service chief executives and senior managers to use a video (produced in 2002) about conflicts of interest to assist staff to recognise and manage possible and actual conflicts of interest; and
- support and encourage departments to reconsider and refresh their policies and procedures and to determine whether the environment supports senior managers and their staff to recognise, understand, and avoid or manage conflicts of interest.

At the political level, the Government is pursuing expanding the ministerial conflicts of interest register from Ministers of the Crown to all members of Parliament. In May 2002, the Government announced the introduction of a register of interests for members of Parliament, to bring New Zealand into line with international practice and ultimately to strengthen trust and confidence in the integrity of Parliament. Members of Parliament would be required to complete returns of listed interests following elections and annually thereafter. All returns would be compiled, presented to Parliament and published. Non-compliance would be dealt with primarily by way of publicity and political pressure.

Notes

1. The Transparency International Corruption Perceptions Index 2002, released in August 2002, ranked New Zealand second equal out of 102 countries.
2. The term "Crown" denotes the functions of central government, including the representative of the Sovereign Head of State (the Governor-General), Ministers of Parliament, the Executive Council (Cabinet) and government departments.
3. Section 32, *State Sector Act* 1988. See also Section 33 of that Act (in relation to decisions on individual employees, chief executives are required to act independently), Section 56 (chief executives are to ensure that their employees maintain proper standards of integrity, conduct, and concern for the public interest), and Section 85 (it is an offence for any person to directly or indirectly attempt to influence the Commissioner or any chief executive in the exercise of their powers).
4. Sections 60 and 61, *State Sector Act* 1988. Note too that the Public Service is not a "career service" or "closed shop": external (private sector) applicants may apply for and are eligible for appointment to Public Service positions.
5. Most of the Office of the Controller and Auditor-General reports referred to in this paper are available on-line at *www.oag.govt.nz*

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Managing Conflict of Interest in the Public Service
OECD Guidelines and Overview

Managing Conflicts of Interest in Transition Economies: The Polish Experience

A. Emerging challenges in the transition period: Historical context of the conflict-of-interest policy

In Poland, as in other central European countries, the transition to a market economy resulted in an historic challenge to establish, at the same time, free markets, democratic political institutions and an accountable state administration staffed by a professional civil service, as the basic conditions for an effective and sustainable economy. A key objective of the new state administration in the early nineties was the establishment of a modern civil service. In realising this objective, far-reaching modernisation of the civil service included its de-politicisation and professionalisation. At the same time, the economic transition expanded the private sector, and the public and private sectors have become more closely inter-connected, and less distinguishable.

Consequently, one of the most important challenges for the reform process was to define the distinction between the private sector and the public sector, and to control their interactions in the course of the transition. In comparison to members of the European Union, which have had long experience of ensuring the separation of the private and public interests of public officials, Poland and other Central European countries had only faced this problem in their transition to a market economy. In the framework of the European accession process, and respecting the administrative traditions of the country, Poland has taken significant efforts to establish clear expectations and define standards governing conflicts of interest in public administration, and to implement the legal framework giving effect to these standards.

Increased awareness of the issue of conflict of interests has been a driving force to elaborate or update policy frameworks in many OECD countries. The growing interactions between the public and private sectors, particularly new forms of co-operation resulting from new public management reforms, has blurred established roles, and required the clarification of standards of integrity and related corruption issues. Public demand for more transparency in public life has become a central factor in a modern conflict-of-interest policy, which frequently requires, for example, the public disclosure of prescribed private interests by holders of public office, particularly senior public officials and politicians.

Reviewing existing mechanisms for preventing and detecting conflicts of interest is also an emerging trend throughout European countries. The separating line between Western and Central European countries is broadly

determined by the differing socio-economic context. Western European countries have been facing rapidly intensified public-private sector interaction, which in turn has demanded revised or new conflict-of-interest policy frameworks focusing on the public service and political office holders. By contrast, Poland like other Central European countries, focused on responding to the political and socio-economic expectations surrounding the changes to public management stemming from the complex political and economic transition process which followed almost half a century of totalitarian rule.

In Poland, two key aspects of the new approach included the re-definition of private interests in ways that were relevant to the new socio-economic environment, and detailed new standards requiring compliance by civil servants and political public office holders.

In Poland, as in most administrative law countries, a conflict-of-interest policy framework is provided by a range of laws and other instruments which govern various aspects of public administration and the activities of individual public servants and public officials. Amendments to upgrade existing legislation started in the early nineties while most of the new legislated standards were enacted from the mid-nineties. One of the most essential sources for the new policy framework, the new law on civil service, came into force in 1999: providing civil servants with a comprehensive set of general requirements and a new *Code of Ethics for Civil Servants* which became the responsibility of the Head of the Civil Service to implement.

B. Definitions and core principles

The law is the main source of general principles and specific requirements which together constitute Poland's conflict-of-interest policy framework. The law also provides definitions of specific forms of conflicts of interest, however, examples can also be found in sources other than law.[1] Certain laws and rules (such as the *Civil Service Act* of 18 December 1998) also apply to the whole civil and public service, while others – for example the *Remuneration of Persons Managing Certain Legal Entities Act* of 3 March 2000, – focus on specific groups that are considered to be more exposed to possible conflicting situations.

Ensuring the impartiality of civil servants and their dedication to serving the public interest are the central focus of the law. In more concrete terms, these laws provide concrete measures for identifying, preventing and avoiding conflict of interests in the public service in general, and for public officials working in public procurement and tax offices specifically. In general, the policy framework reflects a general distinction between *genuine* and *perceived* conflict of interest, as follows:

- *Genuine* conflict-of-interest situations are defined by the law as including, for example, situations in which an official has a relationship with a party

in a legal case such that the result of the case could have an effect on his/her rights and interests; or the party is related to the public official (for example as the official's spouse or relative).

- *Perceived* conflict of interest is considered to occur when there is a mere probability of circumstances arising which could create a doubt about the neutrality of the employee's action.

The *core principles* of the Polish policy framework combine clear standards for identifying conflict-of-interest situations with clear directions for managing such conflicts in the public sector – by disclosure, avoidance, or prevention. The core principles include:

- Political neutrality.
- Equal treatment of participants in administrative proceedings.
- Openness.
- Management control.
- Statutory limitation (for instance on business activity of public servants and public office holders).
- Prevention (for instance by increased emphasis on preventive actions, including training and communication, control mechanisms and disclosures.

Based on these principles, the conflict-of-interest policy is elaborated in detailed rules in several documents,[2] although the main source is the law including the following legal documents:

- *Administrative Procedures Code.*
- *Civil Service Act.*
- *Public Procurement Act.*
- *Act on Limitation on Conducting Business Activity by Persons Performing Public Functions.*
- *Public Prosecutors Act.*
- *System of General Courts Act.*
- *Tax Chamber and Office Guidelines.*

C. Specific policies for particular categories

In order to ensure openness, holders of state managerial position are obliged to submit, at specified intervals, asset-disclosure statements. A register is kept of special-occasion presents and gifts received by State managers [where the gift is not intended as material support for a given public institution]. State managers, prior to appointment, are also obliged to submit a declaration concerning their business activities [and those of their spouse],

and to identify any intention to undertake such activity or alter its character during the time they hold their position. An appointed commission, at the request of the superior or the interested party, may issue an opinion whether a specific business activity could cause suspicions of partiality or self-interest. In addition to such *ex ante* control mechanisms, preventive actions also include training, for example, preparatory service courses or in-service training courses on the protection of confidential information. The Polish conflict-of-interest policy framework also includes specific measures for other classes of official, in addition to the general provisions contained by the *Administrative Procedures Code* for all public officials and the *Civil Service Act* for civil servants. The following public office holders are required to disclose their assets in a formal statement:

- Ministers.
- Staff in a Ministerial cabinet.
- Senior public servants.
- Officials in charge of contract management.
- Judges.
- Prosecutors.

The conflict-of-interest policy has also more specific rules for exclusion from decision-making and other proceedings for the following classes of public official:

- Senior public servants.
- Officials in charge of contract management.
- Procurement officials.
- Customs officers.
- Tax officials.
- Judges
- Prosecutors.

D. Incompatibility and potential conflict-of-interest situations

Fundamental laws which provide basic standards for civil servants (the *Civil Service Act*) and state officials (the *Employees of State Offices Act*), include the following general requirements:

- Abiding by the Constitution and other laws.
- Protection of the interests of the state.
- Protection of human and civil rights.
- Concern for the individual interests of citizens.
- Rational management of public funds.

- Performance of duties in an impartial, reliable, efficient, prompt and conscientious manner.
- Preservation of state and job secrets.
- Development of professional knowledge.
- Dignified behaviour during and outside of work.

Based on these statutory obligations and the core principles generally reflected in the conflict-of-interest policy framework, certain laws also delineate basic incompatibilities for public officials. For appointed civil servants, for example, the following activities and positions are prohibited:

- Creation of and participation in political parties.
- Holding office in trade unions.
- Holding office in local self-government.

Civil servants are also prohibited from:

- Submitting to influence by political pressure groups.
- Accepting presents and other personal benefits for participation in lectures and conferences related to their official position.
- Performing functions in the management, supervision, or audit of profit-based companies.
- Undertaking secondary employment without the consent of their employing organisation.
- Undertaking supervisor/subordinate working relationships with persons of family/personal connection at the workplace.
- Disclosing confidential information.
- Performing commissioned assignments for outside parties.
- Exploiting their position for private purposes.

In addition to these fundamental limitations, public officials are also required to take into consideration a range of other activities and situations that can hold potential for conflicts of interest. Business interests that involve shareholdings, partnership and investments are considered as having potential for conflict of interests for public officials, who are required not to hold more than 10% of shares in a company established under commercial law. In addition, contractual or regulatory relationships with the government agencies, NGOs, and voluntary organisations, are identified as external activities which hold potential for conflict of interests.

In public procurement procedures specific prohibitions prevent an official from acting on behalf of an ordering party, or from performing other actions relating to procurement proceedings involving persons who are:

- In a close personal relationship, for instance, by marriage or kinship, or legal relationship.

- In an employment or commission relationship, or members of the governing body of an entity which is bidding on a tender.
- In *de jure* or *de facto* relationship with the supplier or contractor in such a way that it could give rise to justified doubts concerning their impartiality.

Disclosure of private interests

Disclosing private interests is considered as a key step in identifying and avoiding conflicts of interest. Consequently, Poland introduced a rigorous system which requires Polish civil servants to disclose prescribed assets, liabilities and debts which are considered as holding a potential for conflicts of interest. Members of the civil service are obliged to disclose their private interests as follows:

- *Before employment*: prior to taking up a position, members of the civil service are obliged to submit an asset declaration statement in which they are required to list their real estate ownership (number of houses, apartments) as well as other properties and pecuniary interests. They should also indicate whether they are a member of a management board, supervisory board or audit commission of a company under commercial law, or whether they sit on an executive board of foundations that conduct business activity. They should also provide information on their own business activity and or their involvement in business activity by others.
- *During employment*: civil servants are obliged to submit an annual asset declaration statement by 31 March each year. The declaration includes information on real estate ownership (number of houses, apartments), other properties and pecuniary interests. The declaration should also indicate whether the civil servant is a member of the management board, supervisory board or audit commission of a company under commercial law, or whether they sit on the executive board of a foundation that conducts business activity, or if they conduct business activity on their own or together with other persons. Persons who hold state managerial positions are obliged to report all presents and benefits they receive and debts they incur to the National Registry of Benefits.
- *Post public employment*: on the day they leave their position, civil servants are obliged to submit a final asset disclosure statement in which they should list their real estate ownership (number of houses, apartments), other properties and pecuniary interests, membership of the management board, supervisory board or audit commission of a company under commercial law, and whether they sit on a executive board of a foundation that conducts business activity, or they conduct business activity on their own or together with other persons. Up to one year following the end of their tenure, civil servants cannot be employed by, or perform other activities for,

a business entity if they took part making official decisions in individual cases concerning the business. Persons with state managerial positions are obliged to obtain the consent of a special commission responsible to the Prime Minister in order to undertake employment in an entity that was supervised by the former state official.

In September 2002, the Government adopted a strategy for fighting corruption that requests the widening of property declarations by officials. In seeking to achieve this key objective of the strategy, the Government will introduce amendments to existing legislation in order to create a framework for disclosure of property ownership by personnel working in central and local administrations.

The disclosure policy has been considered as a crucial measure in the Government's policy for preventing corruption.

The most recent modifications in the conflict-of-interest policy intend to bring more transparency to *local government* and in order to restore public confidence in the operations of local governments. The new amendments to laws governing local administration introduced mandatory asset declarations for public officials and also request information on any family ties to recipients of public spending. The rigorous public disclosure requirements for public servants came to effect in the beginning of 2003 as part of the Government's effort to curb corruption and nepotism. The required personal information includes tax returns that are matched with asset declarations, whereby any discrepancy produces criminal liability. Officials must also reveal all personal business activity or that conducted by family members. This particularly applies to commercial ventures that are viewed as a potential conflict of interest with public affairs. Collected data is accessible to the public at local government offices, or on the Internet from spring 2003. Officials who fail to comply with these new requirements will incur financial penalties or even be removed from office. In addition, local government officials are not allowed to receive any gifts or benefits from parties to decisions in which the official participated in an official capacity. This ban remains in force for three years after the end of the term of office.

E. Implementation measures and their assessment

In the Polish transition process, the development and implementation of the new conflict-of-interest policy framework was driven by a context and challenges specific to Poland. However, similar to other OECD countries, a number of factors influenced policy design and execution in the past decade, namely:

- Growing "grey areas" regarding public and private sector relations.
- Rising community demand for integrity from public officials.

- Increased transparency in public life.
- Closer media scrutiny of public officials and governments.
- Supportive political leadership.
- Evolution of the conflict-of-interest notion, with more emphasis on perceived conflicts.
- Gaps in legislative provisions, especially regarding lack of transparency in the implementation of law on issuing decisions.

The changes in conflict-of-interest policy have also had consequences for implementation, with a higher degree of inclusion and importance being given to the role of the employee and public office holders. Consequently, the provision of information and training has become essential. Before employees first start their work in the state administration, new entrants are now required to take a special training programme as part of their preparatory service. During this training they become familiar, *inter alia*, with the regulations which support the conflict-of-interest policy. When public officials assume their jobs in the state administration, they are obliged to fill out an asset disclosure statement and, in connection with this, to familiarise themselves with the provisions of the *Limitation on Conducting Business Activity by Persons Performing Public Functions Act*.

In addition to the general awareness-raising about the prohibitions on business activities in the course of the training for new entrants, advice is also provided during tenure for officials. Either the managers or dedicated persons within the organisation (such as legal counsellor and trade union advisor) can be consulted. Furthermore, independent institutions – such as the Civil Rights Ombudsman – and external organisations (as the Public Procurement Office and Civil Service Office) are also available for consultation. Enforcing and monitoring of compliance with the policy are the primary responsibility of the supervisors, the General Director of the bureau, and the internal control units.

Providing official information about the enforcement of policy and standards has become a key concern. Several channels (such as ministerial statements, public service newsletters and media releases) have been used to inform both public officials and the public in general. The media also plays a critical role in reviewing the policy framework and assessing the occurrence of concrete conflict-of-interest situations.

As a result of these increased transparency measures and wide media coverage, the public pays more and more attention to conflict-of-interest matters, and now brings forward complaints and proposals to the state administrative organisations. As part of internal control, offices have started cyclical checks, for example, the Ministry of Internal Affairs and Administration introduced a systematic control over the issuing of permits to

foreigners who wish to buy property in Poland. Having regard to the particular administrative procedure, the internal control examines whether issued decisions are in conformity with the law. In the case of public procurement, control is the responsibility of the President of the Public Procurement Office according to procedures determined by the *Public Procurement Act*.

General Directors and direct supervisors play a key role in making decisions on the actual measures required to resolve genuine or perceived conflict-of-interest situations. Declaration of private interests, as mentioned above, is a critical precondition for an appropriate decision, which can require transfer of duty, increased transparency and scrutiny of decision, assignment of pecuniary interests to a blind trust, or even resignation as an ultimate step. *Non-compliance* with statutory obligations results disciplinary proceedings, and a range of penalties can be applied depending the seriousness of the violation:

- In general, disciplinary proceedings and penalties for breaching the obligations of a civil servant are specified in the *Civil Service Act*. As an ultimate sanction, a legally valid ruling to discipline a civil servant may result dismissal from the civil service; such dismissal prevents re-employment of the person in the civil service for a period of 5 years. Disciplinary liability based on separate provisions also applies to Police and Border Guard officers.
- In more specific matters, a civil servant is subject to disciplinary liability, including termination of the employment relationship without notice at the fault of the employee in the event of:
  - ❖ Failure to submit an asset disclosure statement.
  - ❖ Failure to disclose asset information consistent with the true state of holdings.
  - ❖ Conducting, contrary to prohibitions, business activity or participating in companies under commercial law.
- Submission of information concerning conflict of interests which is inconsistent with the truth is subject to criminal liability.
- Violation of the prohibitions concerning the limitations on conducting business activity by persons performing public functions constitutes a service offence which is subject to disciplinary liability. It may also constitute a ground for terminating the employment relationship without notice at the fault of the employee.
- In public procurement, in addition to criminal liability, the public procurement proceeding is invalidated or the signed contract resulted by the process is annulled.

Although no diagnostic tools have been employed to assess the conflict-of-interest policy, both international organisations (for example the World

Bank, which published a report on corruption in Poland in 2000), and the Polish Supreme Chamber of Control (the independent audit organisation of the *Sejm*), as well as regional accounting chambers have started reviewing the area. As a general consideration, the following measures have been proven effective in the management of conflicts of interest:

- Limitation on conducting business activity for persons performing public functions.
- Regular and systematic asset disclosure.
- Provisions excluding conflicts in the Administrative Procedures Code.
- Multi-stage control systems (requiring that the draft decision prepared by a public official is checked and accepted by supervisor and then turned to the director for final disposition) accompanied by regular inspection.
- Training sessions to provide information on the policy and inculcate the rules.

F. Recent developments and emerging areas

The concern about the growing interactions between public officials and the business and non-profit sectors, accompanied by rising public awareness, are considered to be the principal factors influencing the development of Poland's conflict-of-interest policy.

Public opinion research indicated the increased expectations of the public – and particularly the growing influence of perception. Taking into consideration the administrative law traditions of Poland, main efforts focus on the upgrade of legal provisions to refine the existing mechanisms of the conflict-of-interest policy. The most recent modifications in the law further tighten statutory obligations of public officials and close loopholes in the legal framework, as well as increasing transparency in public procedures. For example, the latest amendments to the *Public Procurement Act* introduced more restrictions for arbiters, who are now prohibited from combining their function as an arbiter with the function of proxy of the parties in appeals. Moreover, the amendments have made it possible for the president of the Public Procurement Office to appeal rulings by arbiters and send the cases to general courts.

Similarly, the Minister of the Treasury has issued two resolutions to limit involvement by public officials in companies and tenders. The first resolution restricts the participation of representatives of the State Treasury in supervisory boards of companies, state enterprises, agencies and foundations. The second resolution adjusts procedures to be followed by organisations of the State Treasury and State Treasury delegations in the process of concluding or performing contracts with contractors, and strengthens the procedure for

appointing commissions and panels. More amendments are currently under preparation: a draft proposal aims at further sharpening the provisions on the limitations on conducting business activity by persons performing public functions.

Emerging areas that have been influencing the existing conflict-of-interest framework mainly related to the spheres in which the interests of competing parties coincide. These areas include:

- Tenders and public procurement – or the avoidance of tender procedures.
- The issuance of permits and concessions.
- Privatisation of state enterprises.
- The selection of consulting firms for the performance of pre-privatisation analyses.
- The granting of consent to hire more public employees and activities financed by public funds.

Although the existing legal framework involves the business and not-for-profit sectors in the implementation of the policy for the public sector there are number of specific areas that are not covered by the current conflict-of-interest policy. In regard to the business and non-for-profit sectors, the primary support mechanisms for avoiding conflict of interest are considered the basic acts, such as the *Civil Service Act* – with its prohibition to influence civil servants by interest groups – as well as the *Public Procurement Act* and the *Limitation on Conducting Business Activity by Persons Performing Public Functions Act*. Currently there is no legal provision regulating lobbying in the Polish public administration on the part of private sector, or controlling new forms of co-operation, such as the sponsoring of public functions or organisations by non-government organisations.

G. Conclusions

Poland has developed a comprehensive conflict-of-interest policy to respond emerging challenges resulted in the transition process. Current efforts focus on the implementation of the wide variety of established and new legal provisions that are in place for preventing and avoiding conflict-of-interest situations.

In comparison to most OECD countries, the Polish administration has had to develop these measures in the course of a transition period in which the basic legal and institutional settings of the country were transformed. Although, the very extensive legal provisions and policy measures were developed to meet the particular needs and context of the transition period, these measures are also in line with international trends observed in OECD countries.

The Polish public administration has developed a number of measures of conflict-of-interest policy in an exemplary manner during the period of transition. Poland is now at the stage of operationalising and fine-tuning the established legal framework. In a rapidly changing socio-economic environment, particularly taking into account the completion of the European accession process, the legal framework defining conflict-of-interest situations needs continuous adjustment to remain relevant to emerging challenges. Some of the most demanding priorities for the future could be:

- The creation of more flexible policy instruments to meet emerging situations or practices in specific areas – for example in codes of conduct, and disclosure processes.
- The day-to-day implementation of policy and legal requirements.
- The creation of encouragements for officials to comply with the letter and the spirit of the conflict-of-interest policy, and serve the public interest without concern for private interests.
- Regular assessment of the policy and its implementation.

Balancing the advantages and the different challenges resulting from the transition and accession processes, Poland can continue to demonstrate its ability to appropriately adjust existing frameworks in the quickly changing world to meet dynamic challenges to conflict-of-interest policy and practice, which increasingly reflect the overall trends in OECD countries.

Notes

1. Annex 1 provides a catalogue of definitions from laws and guidelines.
2. Annex 2 lists the sources of the conflict-of-interest policy in the primary and secondary legislation as well as in other documents.

ANNEX 1

The Definition of Conflict of Interest

In Poland, a number of legal documents define conflict-of-interest situations. The ***Administrative Procedures Code*** specifies genuine and potential conflicts of interests and contains provisions on the exclusion of employees or administrative bodies from procedures in order to avoid such conflicts (Chapter 5, Articles 24-26). *Genuine conflict of interest* occurs when:

- An official is in such legal relationship that the result of the case could have an effect on his/her rights and duties.
- The party is the official's spouse, relative or kin to the second degree.
- The party is tied to the official by adoption, guardianship or wardship (this disability continues to apply even after the dissolution of marriage, adoptive parenthood, guardianship or wardship).

In addition, such situations when an employee is a representative of one of the parties or a representative is connected to the employee in such a way as specified above also consists a conflict-of-interest situation (Art. 24 § 1 Sub-paragraph 1-4 in conjunction with § 2 of Article 24).

Moreover, in other cases not listed above but the mere probability of circumstances could raise doubts in the neutrality of an employee, a *perceived conflict-of-interest* situation exists and the Act requires the exclusion of the employee involved from the procedures (Art. 24 § 3 of the Administrative Procedures Code). In case of the material interests of the director of a department or office (as well as persons connected with him/her by marriage, relation or kinship to the second degree, adoptive relation, guardianship or wardship) the Act also requires the exclusion of involved public body (Art. 25 of the Administrative Procedures Code).

The ***Civil Service Act*** gives the catalogue of duties of civil servants (Art. 67 Sub-para. 1 point 4 in conjunction with Art. 1 and 39), and particularly lists their duty to remain impartial in the performance of tasks. Correspondingly, civil servants may not be guided by an individual or group

interest which could have the character of a *genuine or perceived conflict of interest* when they perform their professional duties. In practice, this is the source of a wide catalogue of prohibitions concerning social involvement of civil servants that could undermine public confidence in the objectivity of public institutions (Art. 69). For example, the Act proscribes civil servants not to:

- Undertake secondary employment without the consent of the general director of their office.
- Perform actions or occupations that would contradict their duties stemming from the Act or undermining confidence in the civil service. This prohibition concerns the undertaking of all kinds of gainful activities without the consent of the general director of the office.

Reflecting the raising concern in the public, another recent law specifically identifies those situations that create genuine or perceived conflicts of interest. The *Limitation on Conducting Business Activity by Persons Performing Public Functions Act* (Art. 1, 2 and 4) specifies the persons who cannot occupy the following posts while performing public functions:

- Cannot be members of management boards, supervisory boards or audit commissions of companies under commercial law.
- Cannot be employed or perform other activities in companies under commercial law which could give rise to suspicions of partiality or self-interest.
- Cannot be members of management boards, supervisory boards or audit commissions of co-operatives, with the exception of supervisory boards of housing co-operatives.
- Cannot be members of executive boards of foundations that conduct business activity.
- Cannot hold more than 10% of the shares in companies under commercial law or shares representing more than 10% of capital stock in any of these companies.
- Cannot conduct business activity by themselves or together with other persons, or administer such activity or be a representative in conducting such activity. This provision does not apply to productive activity in agriculture within the scope of plant or animal production, in the form and within the scope of a family farm.

The ***Public Procurement Act*** also contains a provision (Art. 20) concerning possible conflicts in public procurement procedures. The following persons who meet the criteria indicated below may not intercede on behalf of ordering parties or perform activities related to public order proceedings, nor appear in the role of experts:

- Are married to or related in direct line, or related or akin to the second degree or connected by adoption, guardianship or wardship to the bidder,

his/her legal deputy or members of the governing bodies of legal persons bidding on tenders.

- Were in an employment or commission relationship with the bidder or were members of the governing bodies of legal persons bidding on tenders within three year prior to the date the proceedings were commenced.
- Are in a *de jure* or *de facto* relationship with the supplier or contractor such that it could give rise to justified doubts as to their impartiality.

It is also stated in the Act (Art. 22 Sub-para. 5) that in procedures for public contracts worth more than 30 000 euros, suppliers and contractors should submit declarations concerning whether they are in a dependent or dominant relationship (as defined by the *Public Trading in Securities Act* of 21 August 1997) with other participants in the proceedings or the ordering party or persons on the side of the ordering party taking part in the proceedings.

Moreover, the ***Procedural Regulations for Checking Complaints in Public Procurement Matters*** (Art. 1) states that the arbiter designated to review the complaint may be excluded from participation in proceedings when reviewing complaints concerning public procurement cases. Exclusion of the arbiter may take place at the request of a participant in the proceedings, which request should contain an explanation. The arbiter should inform the President of the Public Procurement Office about the circumstances making it impossible for him/her to perform these duties, and in particular, about the reasons justifying his/her exclusion. On the facts presented, the President shall decide whether to exclude the arbiter or refuse to do so in the form of a decision that shall be final in character.

In order to help the implementation of the Government's financial policy, the Minister of Finance issues annually the Tax Chamber and Office Guidelines that specify the rules ***Treasury Office*** employees are to follow when performing their work and the consequences of not abiding by them. The Treasury Office employees may not:

- Perform functions in the management boards, supervisory boards or audit commissions of companies under commercial law or foundations conducting business activity.
- Hold more than 10% of the shares or capital stock in companies under commercial law.
- Undertake additional employment without the consent of the general director of the bureau.

Pursuant to the regulations, an employee of a tax office or chamber shall be excluded from dealing with cases relating to tax obligations or other cases governed by the provisions of tax law in which the employee:

- Is a party.

- A party is the employee's spouse, siblings, ascending or descending.
- The parties are persons connected with the employee by adoption, guardianship or wardship.
- Was a witness or an expert for, or has been the representative of the taxpayer.
- Took part in issuing an appealed decision.
- Circumstances transpired in connection with which service, disciplinary or penal proceedings were commenced against the employee.

The regulations also permit the exclusion of institutions from the process. For example, the tax office should be excluded from dealing with cases relating to tax obligations or other cases governed by the provisions of tax law in the event the case concerns:

- The head of the Tax Office or his/her deputy or the director of the Tax Chamber or his/her deputy, and also the spouse, siblings, ascending or descending line of the aforementioned persons.

There are strict provisions for public officials working in the ***law-enforcement***. Public prosecutors are not allowed to hold any position in addition to their jobs, with the exception of academic-didactic posts proscribed by the *Public Prosecutors Act* (Art. 49-49a). Nor are they allowed to undertake activities that could interfere in the performance of their duties as prosecutors or that could be detrimental to the honour of the office or undermine public confidence in their impartiality. Prosecutors are not allowed to be member of a management board, supervisory board or audit commission of a company under commercial law. They cannot sit on executive board of a foundation that conducts business activity nor conduct business activity on their own or together with other persons. Prosecutors are obliged to submit an asset disclosure statement.

Judges in regional or district courts may not undertake additional employment without the consent of the president of the relevant court or of the Minister of Justice, with the exception of academic-didactic posts (*System of General Courts Act***,** Art 86-87). Judges are also not permitted to undertake activities that could interfere in the performance of their duties as judges or that could be detrimental to the honour of the office or undermine public confidence in their impartiality. In specific, judges are not allowed to be member of a management board, supervisory board or audit commission of a company under commercial law. They cannot sit on executive board of a foundation that conducts business activity nor conduct business activity on their own or together with other persons. Moreover, judges cannot hold more than 10% of shares in a company established under commercial law. Similarly to public prosecutors, judges are obliged to submit their asset disclosure statement. In addition, the *Employment Code of the Police and Border Guard Officers* contains provisions concerning the exclusion of these officers in cases where a conflict of interest could arise.

ANNEX 2

Documents Stating the Principles and Rules of the Conflict-of-Interest Policy

In primary legislation

- *System of General Courts Act* of 27 July 2001 (Dz. U. Nr 98, *poz*. 1070 as amended).
- *Code of Commercial Companies Act* of 15 September 2000 (Dz. U. Nr 94/2000, *poz*. 1037).
- *Remuneration of Persons Managing Certain Legal Entities Act* of 3 March 2000 (Dz. U. Nr 26/00, poz. 306).
- *Civil Service Act* of 18 December 1998 (Dz. U. Nr 49/99, *poz*. 483 as amended).
- *Tax Ordination Act* of 29 August 1997 (Dz. U. Nr 137/97, *poz*. 926 as amended).
- *Limitation on Conducting Business Activity by Persons Performing Public Functions Act* of 21 August 1997 (Dz. U. Nr 106/97, *poz*. 679 as amended).
- *Treasury Offices and Chambers Act* of 21 June 1996 (Dz. U. Nr 106/96, *poz*. 489 as amended).
- *Public Procurement Act* of 10 June 1994 (Dz. U. Nr 119/98, *poz*. 773 as amended).
- *Treasury Audit Act* of 28 September 1991 (Dz. U. Nr 54/99, *poz*. 572 as amended).
- *Public Prosecutor's Act* of 20 June 1985 (Dz. U. Nr 19/94, *poz*. 70 as amended).
- *Labour Code Act* of 26 June 1974 (Dz. U. Nr 24/74, *poz*. 141 as amended).
- *Administrative Procedures Code* of 14 January 1960 (unified text: Dz. U. Nr 98/00, *poz*. 1071).

In secondary legislation

- The Directive of the Prime Minister of 20 August 1999 – Procedural regulations for checking complaints in public procurement cases.

In other legal documents

- Treasury Chamber and Office Guidelines for realising the Government's financial policy – issued annually in the form of a decision of the Minister of Finance.
- Decision of the Minister of the Treasury on restricting the participation of state treasury representatives in the supervisory boards of companies, state enterprises, agencies and foundations.
- Decision of the Minister of the Treasury on the procedures organisational units and delegations of the ministry are to follow in concluding and performing contracts with contracting parties and procedures for appointing commissions and panels.

Code of conduct

The draft code of ethics for civil servants, that was drawn up in 2000, also addresses conflict-of-interest issues. The draft code was shared with experts and practitioners in 2001 and 2002 to get a wide feedback in order to help the implementation of the code. The final version of the draft was submitted to the Civil Service Council and then sent to the Prime Minister to be signed. The *Civil Service Code of Ethics* came into force on 11th October 2002.*

International documents

- Model Code of Conduct for Public Officials approved in the Recommendation No. R(2000)10 by the Committee of Ministers of the Council of Europe.
- *20 Leading Principles in the Struggle Against Corruption* adopted in Resolution No. (97)24 by the Committee of Ministers of the Council of Europe.

Although these documents adopted by the Committee of Ministers of the Council of Europe are considered as "soft law", their implementation is subject to monitoring in the Group of Countries Against Corruption (GRECO). Poland is an active member in the GRECO programme that takes place in the framework of the Council of Europe.

* The full text of the *Civil Service Code of Ethics* together with the Order of the Prime Minister can be seen in Annex 3.

ANNEX 3

The Order 114 of the Prime Minister of 11th October 2002

In due consideration of the fundamental criteria for the exercise of State obligations in offices of the governmental administration, as expressed in Article 153 (1) of the *Constitution of the Republic of Poland* and in Article 1 of the Civil Service Act of 18 December 1998 (*Dziennik Ustaw* 1999, No. 49, position 483, No. 70 position 778 and No. 110, position 1255, No. 102, position 1116, No. 111, position 1194, No. 128, position 1403 No. 154, position 1800 and *Dziennik Ustaw* 2002, No. 150, position 1237) and the necessity for the complete fulfilment of said obligations during the activities of the civil service;

In order to set procedural standards that should be followed by civil servants and civil service employees and assist them in the proper satisfaction of those standards, in accordance with societal and citizen's expectations;

And taking into consideration Recommendation of the Council of Ministers of the Council of Europe No. R/2000/10 of 11 May 2000 on the *Model Code of Conduct for Public Officials*;

Upon the petition of the Head of the Civil Service that was submitted after consultation with the Civil Service Council:

§ 1

The Civil Service Code of Ethics, as an annex to the order, is hereby enacted and conscientious adherence thereto is advocated.

§ 2

The Head of the Civil Service has been charged with disseminating this code among civil servants and civil service employees, with examining its usage in practice and clarifying and interpreting the resolutions of the code in light of actual practice.

The Prime Minister

The Civil Service Code of Ethics

§ 1

Public Administration is an authority in the service of the rights of citizens and the law in general. The civil service corps member shall treat his work as a public service; he/she shall always bear in mind the common good of the Republic of Poland and her democratic system; he/she shall protect the justified interests of each individual and in particular:

1. He/she shall act so that their activities may provide a paragon of the rule of law and contribute to increase the citizens' confidence in the State and its authorities.
2. Constantly aware of the service he/she owes to the public in their work, he/she shall perform it in the respect of the dignity of others and with a sense of their own dignity.
3. He/she shall remember that their conduct provides a testimony of the Republic and her authorities and contributes to the image of the civil service.
4. He/she shall give priority to the public good over their own and their environments' interests.

§ 2

The civil service corps member shall perform their duties reliably and in particular:

1. He/she shall work conscientiously, striving to achieve the best results in their work and considering it their duty to perform their assignments in a discerning and judicious way.
2. He/she shall be creative and show an active approach to their assignments, with the best will, and shall not be confined with following their very letter.
3. He/she shall not shirk making difficult decisions and the responsibility for their conduct, he/she shall know that the public interest requires well-considered and effective activities, carried out in a resolute way.
4. He/she shall not follow their emotions in the investigation of the cases and he/she shall be ready to accept criticism, recognise their errors and correct their consequences.
5. He/she shall meet all their obligations in the respect of law and the procedures prescribed.
6. He/she shall make a rational use of public property and resources, with care and constant readiness to account for their actions in that respect.
7. He/she shall be loyal to the office and their superiors and ready to execute all official instructions, while taking care to prevent any infringement of the law or error.

8. He/she shall show reserve in expressing in public his opinions on the work of their office or other offices and state authorities.
9. He/she shall understand and accept that the work in the public service means the approval to the limitations of the rule of confidentiality of information on both their professional and private life.

§ 3

The civil service corps member shall take care to enhance their competencies and in particular:

1. He/she shall constantly develop their professional knowledge necessary to ensure them the best possible performance in their work within the office.
2. He/she shall strive to be fully aware of the legal texts and all factual and legal circumstances of the cases he/she encounters.
3. He/she shall be willing to use the knowledge of their superiors, colleagues and subordinates, and should he/she lack specialised knowledge – to use the competencies of experts.
4. He/she shall always be ready to provide a clear – essential and legal – justification for their decisions or conduct.
5. When performing joint administrative assignments he/she shall be concerned about the quality of their content and good interpersonal relations.
6. In situations of discordant opinions he/she shall aim at an agreement based upon objective argumentation.
7. He/she shall be kind to the people, prevent or relieve tensions at work, respect the rules of correct behaviour towards everyone.

§ 4

The civil service corps member shall be impartial in the execution of their assignments and duties and in particular:

1. He/she shall show discernment and caution, striving to exclude suspicions of any relationship between the public and private interest.
2. He/she shall not undertake any work or occupation that might interfere with their official duties.
3. He/she shall not accept any form of payment for his public pronouncements when related to the post he/she holds or the duty he/she performs.
4. In the administrative proceedings he/she conducts, he/she shall ensure equal treatment to all the parties involved, without surrendering to any pressure and accepting any obligations originating from family, acquaintance, work or other relations.

5. He/she shall not accept any material or personal advantages from the persons involved in the cases he/she conducts.
6. He/she shall not display their familiarity with persons who are publicly known on account of their political, business, social or religious activities and shall avoid opportunities to promote any groups of interest.
7. He/she shall respect the citizens' right to information, having in mind the transparency of public administration, while preserving the confidentiality of information protected by law.
8. He/she shall accept limitations of possibility of being employed in the future by persons whose cases have been handled by his employing office.

§ 5

In the execution of his assignments and duties the civil service corps member shall be politically neutral and in particular:

1. He/she shall implement the strategy and programme of the Government of the Republic of Poland in a loyal and reliable way, regardless of their own convictions and political opinions.
2. When drafting proposals of administrative actions, he/she shall provide their superiors with objective advice and opinions, in accordance with their best will and knowledge.
3. He/she shall not manifest their political opinions and sympathies, and if he/she is a civil servant, he/she shall not arrange and belong to any political party.
4. He/she shall openly keep their distance from any political influence or pressure that might lead to partiality in action and shall not engage in activities that could serve party purposes.
5. He/she shall be concerned about the clarity and transparency of their relations with persons performing political functions.
6. He/she shall not take part in strikes or actions of protest that might interfere with the operations of the office.
7. He/she shall fight off political influence upon the recruitment and promotion in civil service.

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Managing Conflict of Interest in the Public Service
OECD Guidelines and Overview

The Exclusiveness Principle in Practice: The Portuguese Experience

by

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A. Summary

The discharge of public duties is governed by the principle of exclusiveness stated in the Portuguese Constitution. The exclusiveness principle prohibits any activity disqualified by law or that can be seen as jeopardising the neutrality required to serve the public interest in the performance of public duties. The Portuguese framework for preventing conflict-of-interest situations is primarily based on comprehensive legal regulations that determine, both in general for the whole public service and more specifically for certain positions, those activities which are incompatible with positions in the public service.

In practical terms, conflict of interest involves an incompatibility stemming from the discharge of duties where the public interest converges with personal interests, both financial and patrimonial, whether direct or indirect in nature. Consequently, those activities and positions that directly or indirectly allow personal material advantages to be taken, or advantages of any other nature whatsoever, and give rise to violation of citizens' rights or interests protected by law, are seen as incompatible with the duties of a public official.

B. Constructing a comprehensive legal framework

The *Civil Service Regulations* themselves compel public administration workers to be unbiased, *i.e.* not to avail themselves of direct or indirect benefits or pecuniary benefits of any other nature whatsoever from the duties they perform, and to act with impartiality as regards interests and private pressures of any kind, so as to comply with the principle of equality among citizens. Laws set out incompatibilities between public positions or employment and other activities, and laws also lay down measures to be employed as cases arise.

Despite the exclusiveness of duties being the common rule, there are a number of exceptions, such as research and teaching activities in higher education. Performance of other duties by civil servants and other contractual staff is always subject to statutory authorisation.

The following laws and regulations constitute the *main sources* of general principles and rules for avoiding conflict-of-interest situations:

- *Primary legislation* which includes the Constitution that sets the basic regulations for the tenure in office for civil servants and other Government

officers and their obligation to exclusively serve the public interest. The Constitution also prohibits the plurality of offices, excluding situations expressly stated by law (Article 269 of the *Constitutional Law* No. 1/2001, dated 12 December). In addition to the generic principle of exclusiveness, the Constitution also regulates some specific cases. For example, it states cases of disqualification and impediments for parliamentarians (members of the Assembly of the Republic in Article 154 of the *Constitutional Law*) and incompatibilities and restrictions for holders of public offices, including senior public offices (No. 3, 4 and 5 of Article 216 of the *Constitutional Law*). In addition, laws give further details of disqualifications and impediments applicable to holders of political posts and senior officials (Law No. 64/93) and set out the new regime of disqualifications (Law No. 12/96 dated 18 April). A recent change in the legal framework expanded the exclusivity regime and the special regime of disqualifications for management staff (*e.g.* Article 22 and 23 of Law No. 49/99 dated June 22).

- *Secondary legislation* which has played a substantial role both in the establishment and the evolution of the conflict-of-interest system, particularly in the modifications that took place in 1993. The founding blocks are the *Code of Ethics for the Civil Service* (Decree-Law No. 427/89 dated 7 December) and the regulations on exclusivity of office (Article 12, Decree-Law No. 184/89 dated 2 June). Other important laws in the development of the system include the new framework of disqualifications applicable to ministerial staff (Decree-Law No. 196/93 dated 27 May) and regulations on conflicts of interest resulting from tenure in office (Decree-Law No. 413/93 dated 23 December).

On the whole, plurality of duties are the exception rather than the rule, both in the public and in the private sector, according to the laws that set out norms for strengthening the civil service ethos and ensuring the exclusiveness regime in discharging public duties. But in the exceptional cases when plurality of office is permitted, these laws also impose a compulsory prior authorisation.

Laws lay down additional requirements and more detailed standards not only for politicians (including ministers), their staff in ministerial cabinet and senior public servants but also for *particular categories* of public officials to avoid situations of potential conflicts of interest. These include the following categories:

- Officials in charge of contract management.
- Customs officers (Article 105 of Decree-Law No. 252-A/82, dated 28 June).
- Tax officials (Article 32 of Law No. 363/78, dated 28 November and Article 73 of Decree-Law No. 84/84, dated 16 March, *Statute on General Council of the Bar*).

- Auditors (Decree-Law No. 112/2001, dated 6 April and Decree-Law No. 154/2001, dated 7 May).
- Judges (*Constitutional Law* No. 1/2001, dated 12 December).
- Prosecutors (Law No. 60/98, dated 27 August, the *Public Prosecutors Statute*).
- Doctors (Decree-Law No. 73/90, dated 6 March).

Associations and representatives of public administration employees have been consulted in the preparation of legal instruments, as prescribed by applicable legislation, as well as the government bodies of the Autonomous Regions of Azores and Madeira and the national association of Portuguese municipalities.

C. Putting the exclusiveness principle into practice

As a general principle, it is a constitutional requirement for holders of public offices within organs with supreme authority and holders of other political posts as well as those holding senior public offices or equivalent to carry out their duties on an *exclusiveness* basis. Chairmen, vice-chairmen and members of the management of public institutions, public foundations or public bodies, as well as directors general and deputy directors general and those with similar status should also fulfil their duties on an exclusiveness basis, regardless of the type of appointment or designation. Likewise, holders of managerial posts are banned from duties in private sector posts even though they resort to third parties, except in cases when it is duly justified and authorised by the appropriate member of Government. This authorisation can only be granted in cases where the concerned activity does not jeopardise or interfere with neutrality required for the fulfilment of the officials' posts. In general, the exclusiveness regime entails *disqualification* in the following cases:

- Any other professional activities, whether they are remunerated or not.
- Adherence to governing bodies of any profit-making corporate bodies, or the remunerated participation in governing bodies of other corporate bodies.

Research and teaching activities in higher education, non-remunerated participation in commissions or working groups, advisory bodies, auditing bodies or any other corporate entities are excluded from the said regulations whenever provided for in law and in fulfilment of supervision and control of public money. In addition, participation in commissions and working groups is also excluded whenever they are set up by a resolution or a decision of the Council of Ministers, as are representative functions of ministerial departments or public services. Holders of senior public posts may be entitled to copyright and fees resulting from organising short conferences, seminars, training initiatives and any other activities with a similar nature.

Regulations also *further specify* cases of disqualification, such as, for instance, the followings for *tax officials*:

- To act as lawyers or as solicitors, with the exception of the lawyers from the Centre for Tax Studies and Legal Consultancy in non-tax cases.
- To establish relationships with businesses or industry, except in cases duly authorised by the Minister of Finance.
- To fulfil any public or private activity, without authorisation from the Minister of Finance, that can jeopardise neutrality required in the discharge of duties, namely, whenever such activities bear a similar connection thereto, even though they are fulfilled resorting to a third party.

Lawyers who are either permanent or temporary public office holders, they are also banned from acting as private lawyers. The ban also applies to them if they are retired, unemployed, on unlimited leave of absence or in a pool awaiting assignment, whenever public or administrative services to which they are linked are involved.

At the *sub-national level* particular restrictions exist that are related to the specificity of exercising public power in local self-governments, for example, for municipal councillors performing part-time duties. Although they are allowed to carry out a number of activities, some of them are seen as incompatible with the duties of an elected municipal officer on a part-time basis. They shall not:

- Be members of governing bodies of public corporate bodies, of statutory undertakers and of companies which are mostly or entirely state-owned.
- Provide professional services, consultancy, advisory services and legal assistance to public corporate bodies, statutory undertakers or companies participating in public invitation of tenders.
- Carry out business or industrial activities in the domain of the corresponding municipality, on their own or by means of an entity in which they hold a share, nor shall they participate in government calls for tenders, services, sub-contracting or undertakings or in any other calls from corporate bodies of public law. Furthermore, it is forbidden for municipal councillors to participate in such tenders called by companies whose share capital is mostly or exclusively state-owned, or called by statutory undertakers.
- Provide legal assistance to foreign states.
- Benefit personally and unduly from acts, nor shall they enter into contracts, whose creation counted upon organisations or services under their direct influence.

In spite of the development of the existing legal framework, day-to-day experience points to a reality where a number of “grey areas” are palpable.

This applies to less transparent situations where issues of neutrality meet conflicts of interest due to a financial and patrimonial interest, whether direct or indirect, which might influence the performance of an official duty. In the past few years, a growing concern has increased regulation of activities and situations that in practical terms had proved to generate conflicts of interest. A critical area where most cases of conflicts of interest occur is the health sector because the medical staff is not covered by the exclusiveness regime.

In addition to the "grey areas" caused by the increasingly close relationship between the public and private sectors, other decisive factors that have influenced the evolution of conflict-of-interest policy are:

- The growing demand for quality of services provided to citizens.
- The rising public awareness and rising community expectations to increase transparency in public life, that have drawn attention to the conflicts of interest concept and on perceived conflicts.

The overall trend of the last decade was an emphasis on clarifying rules and providing a more precise definition of conduct through remedial action that aimed at plugging identified shortcomings. In addition, the existing complementary mechanisms and tools have also been strengthened. The latest change took place in 1996, when a new law[1] set out the current framework for disqualification. This is considered as the only way to fully ensure the prevention and settlement of conflict-of-interest situations that may arise during a term of office.

The former mechanisms to ensure that no conflicts of interest were generated by the plurality of functions were solely based on the political accountability of political post holders and staff appointed on a trust basis. These mechanisms were replaced by a system based on the requirements of transparency. Current measures are intended to preserve the neutrality of public office holders and promote openness of all private or public professional activities.

Therefore, *holders of political posts* and *public offices* are disqualified from carrying out the following:

- Any *private or public professional activity*, whether remunerated or not, barring those resulting from performance of the official duty itself. Teaching activities in higher education and activities falling within the scope of the corresponding professional speciality and rendered on a non permanent basis to entities outside the field of activity for which the concerned official is responsible, are exceptions provided the appointment order authorises them.
- *Executive positions* in governing bodies of public corporations, mostly or fully publicly-owned companies, statutory undertakers, credit institutions or

bank-like institutions, insurance companies, real estate companies. Similarly, executive positions in governing bodies of any corporation entering into contracts with the government and all other public law entities.

- *Voting rights* relating to a more than 10% shareholding in companies participating in public invitation for tenders for provision of goods and services and entering into contracts with government and other corporate bodies of public law.

The system has also introduced *post public employment restriction* for senior public office holders and public servants working for the highest central government authority. Holders of political posts and senior officers are also banned from acting as arbitrators or experts in any legal proceedings involving the State and other public corporate bodies. This impediment remains in force until one year has elapsed since termination of office. In addition, holders of posts in highest central government authority and holders of political posts[2] are banned for a three year period from fulfilling duties in private companies operating in sectors they have directly supervised, if during their term of office such companies were subject to privatisation operations or have benefited from financial incentives schemes and tax benefits of a contractual nature. However, an exception is made where concerned officials go back to the same company or resume the activity they were carrying out at the time of taking up office.

The legal framework also provides some reciprocal *provisions for business and non-profit sectors* to support the measures in place to avoid conflict-of-interest situations in the public sector. Companies in which an official working for the highest central government authority, a political post holder or a senior official holding more than 10% shares are prohibited from:

- Participating in calls for tenders for the provision of goods and services while carrying out their business or industrial activity.
- Entering into contracts with the state and other public corporate bodies.

The same regime is applicable to companies where:

- The spouse of the official concerned not affected by a limited divorce, the ancestors and descendants in whatever degree and collateral relatives up to the second degree, as well as the cohabiting partner hold an equal share amount.
- The official concerned, directly or indirectly holds, on his own or jointly with his relatives determined above, a no more than 10% share.

When public officials have a doubt about a concrete case, they can contact their managers, dedicated persons both within and outside the organisation concerned (including Trade Unions) for *counselling*. The Directorate General for Public Administration also operates a central telephone help desk that can be consulted if an official is in doubt.

D. Disclosure: An effective supporting mechanism

The implementation of legal regulations is supported by complementary mechanisms, amongst which the disclosure of individual interest plays a significant role in bringing transparency to the system to prevent conflicts of interest. Key actors of this system include:

- The Constitutional Court, which reviews, monitors and confirms declarations submitted by holders of political posts.
- The Attorney General's Office, which checks formal compliance of declarations and the existence of any incompatibilities and impediments concerning the senior officials. The Attorney General's Office has to notify appropriate bodies with a view to checking and sanctioning irregularities or non-compliance with the time limit for submission of such declarations.
- Managers who check any unauthorised plurality of offices held by civil servants and contractual staff. In general, managers also supervise compliance with statutory obligations.
- The mayor or the delegate councillor who is vested with such powers in local self-government.

Portugal has introduced obligatory disclosure reports for political posts, including parliamentarians, and other senior officials. Holders of political posts must file with the Constitutional Court within sixty days after taking office, a declaration of no-disqualification or impediments, stating all offices, duties and professional activities performed by the applicant, as well as any initial shareholding.

As for *senior officers*, they must file with the Attorney General's Office, within sixty days after taking office, a declaration of no disqualification or impediment stating all data needed for checking compliance with provisions of law No. 64/93. The Attorney General's Office may ask that the content of such declarations be clarified, in case of doubt. Failure to clarify any doubts, or insufficient clarification, leads to the competent bodies being notified to check irregularities, and exposure to sanctions if necessary. In the event the declaration is not filed, the official is required to appear before the competent bodies within 30 days. Deliberate non-compliance with relevant requirements leads to a loss of office, resignation or legal removal from office. In this case, relevant authorities have to notify the Constitutional Court and the Attorney General's Office of the date when the officials concerned took up their office.

For *parliamentarians*, an open list of interests was created in the Assembly of the Republic in 1993. This list of interests consists of all activities which may generate disqualification and impediments and any other acts that may yield financial benefits or generate conflicts of interest. It comprises the

following specific data for Deputies of the Assembly of the Republic and members of Government:

- Public or private activities, including businesses or companies as well as professional activities.
- Roles on governing bodies of companies, even if not remunerated.
- Financial or material support or benefits received for such activities, namely from foreign entities.
- Entities to which remunerated services of whatever nature are rendered.
- Companies of which the official by himself, or on behalf of his/her spouse or children, is a shareholder.

Individuals' lists of interest are available to the public for consultation. Creation of a similar list for local authorities is not compulsory, however, local self-government assemblies have authority to decide upon the creation of such a list, its governing regulations, the content and implementing mechanisms.

Contractual staff and civil servants seconded to hold *advisory posts* or technical consultancy to holders of political posts and senior officials must file a declaration stating that they have no conflicting private interest. This type of declaration should be filed when someone takes an office and it is valid during the term of office.

Civil servants and contractual staff of central, regional and local administration, including staff of public institutions, carrying out either personalised or public funding services are prohibited from:

- Performing any private activity (on their own or by way of a third party, and for pecuniary consideration, be it autonomous work or subordinate work) that competes with, or is similar to, that performed within public administration and which may generate conflicts of interest.
- Providing third parties (either on their own or by way of a third party, be it autonomous work or subordinate work) with services dealing with review, preparation or financing of projects, applications and requests to be submitted to their consideration or decision, or to the consideration and decision of bodies or services placed under their liability or direct influence.
- Personally and unduly benefiting from acts or entering into contracts whose drafting benefited from the intervention of bodies or services directly accountable to them or placed under their direct influence. Non compliance of these provisions makes such an act or contract void.

A spouse's interest is considered to be equivalent to that of holders of functions in public organisations, civil servants and contractual staff, for example the interest in companies in which they hold not less than a 10% and not higher than 50% share, either directly or indirectly, on his own, or jointly

with his family. Members of the family include spouse, ancestors, descendants, and collateral relatives up to the second degree, as well as the person cohabiting with the official concerned. When the share holding is higher than 50%, it must be seen as the self-interest of concerned holders of public office, civil servants and contractual staff.

E. Strong enforcement

Legal regulations not only pronounce the principle of exclusiveness and describe some cases for particular officials, but also specify the consequences of non-compliance with concerned laws. When it comes to political posts, senior public posts, advisers or technical consultants, a breach of the law relating to disqualifications and impediments entails removal from office of the faulty official by administrative courts. Non-compliance with provisions relating to exclusiveness and impediments applicable to companies entails the following sanctions:

- Loss of mandate for holders of elected posts, except for the Head of State.
- Resignation for holders of non-elected posts, except for the Prime Minister.

Advisers in ministerial offices who failed to submit the requested declaration certifying that there is no conflict of interest when they take office, or misrepresentation entails immediate cessation of office. The advisers concerned should also return all benefits that they might have received.

When senior civil servants fail to comply with regulations after leaving office, restrictions applicable to companies and to arbitration and expertise, they face a three-year suspension from senior political offices and senior public offices.

For managerial staff, failure to comply with legal provisions relating to principle of exclusiveness entails the justifiable loss of office.

For civil servants and contractual staff who do not observe the relevant legal provisions the following disciplinary sanctions can be applied:

- Non-activity, in cases where they carry out any private activity concurrent or identical to those they perform in the public administration and where such activities give rise to a conflict of interest. Similarly, inactivity is applicable in cases when those activities are carried out without authorisation or when authorisation is given on the basis of misrepresentation or incomplete information given by the applicant.
- Non-activity or suspension respectively in those cases when they render services to third parties in the ambit of issues to be reviewed or decided upon by themselves or by persons they have designated, promoted or appraised until a full year has elapsed, or by organs or contractual staff

collaborating with them on an equal hierarchy basis within the same services or department.

- Suspension – in cases when they take part in deeds and contracts in the creation of organisations or services under their direct supervision or influence.
- Fine[3] – in cases where they fail to notify existing conflicts of interest involving persons or entities mentioned above (for example family or companies in which they hold no less than 10% and no more than 50% of the share capital).

Notes

1. Law No. 12/96 dated April 18.
2. This requirement is not applicable to all other holders of public offices, which therefore imposes a shortcoming in the Portuguese legislation that needs remedy.
3. In addition penal sanctions can also be taken into account (Articles 372, 373, 376 and 377 the *Penal Code*).

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Managing Conflict of Interest in the Public Service
OECD Guidelines and Overview

Managing Conflict of Interest in the Executive Branch: The Experience of the United States

by

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A. Summary

The United States has moved from managing conflicts of interest primarily through reactive criminal prosecutions to a proactive training, education and counselling programme. The focus is on criminal, civil and administrative standards, and the detection and resolution of potential conflicts of interest using financial disclosure reports. Underpinning this proactive programme is an effective enforcement system with a range of penalties.

The rights of employees to fair notice of the standards to which they will be held accountable undoubtedly contributes to making the system for managing conflicts appear heavily rule-based in the United States. These rules, however, flow from fundamental principles of public service that embody aspirational goals. It is the task of conveying to employees both the ideals those goals represent and enforceable standards that makes the programme challenging and vibrant.

B. Introduction

Each of the three branches of the federal government of the United States – executive, legislative and judicial – has designed programmes to manage conflicts of interest on the part of the individual officers and employees of that branch. All of those programmes have similar elements, but the executive branch programme is highlighted in this chapter because it is the most extensive. While these ethics programmes focus on individual integrity, they function within a larger framework of systems that are designed to promote institutional integrity.

Key elements designed to support *institutional integrity* include: an independent judiciary; open, public legislative processes following standardised procedures with a written, public record; executive offices charged with conducting effective investigations and prosecutions; open judicial, administrative and contracting processes also following public, standardised procedures with written public records; public appropriation and budgeting processes; a generally merit-based civil service with adequate pay, training and standardised processes for imposing disciplinary sanctions or protecting employees from reprisal; public rights of access to government proceedings, documents and information; and checks and balances of power across the three branches. In addition, the government functions under the eye of an engaged civil society and free press.

Building upon those institutional systems, the three branches of the United States Government have developed programmes to prevent, address and manage individual conflicts of interest – as well as the appearance of those conflicts, as mentioned in the following section. The common elements of these programmes include:

1. A body of *enforceable standards* comprising complementary criminal statutes (applying to both the government official and any private party working in association with the official), civil ethics statutes and administrative codes of conduct based upon core public service concepts.
2. Public and, within the executive branch, confidential *financial disclosure systems* that are designed to identify and then to address potential conflicts of interest defined by the statutes and regulations comprising the standards.
3. Systematic *training and counselling* services available to officers and employees regarding all restrictions; and
4. *Effective enforcement* mechanisms.

Most of the elements contained in these programmes have evolved over the last thirty years. Experiences during this period have led to fundamental changes in the programmes, and will likely lead to more.

C. Building frameworks: Shifting the emphasis from prosecution to prevention

Prior to the 1960s the United States addressed conflicts of interest of its federal officers and employees (including judges) almost exclusively through *criminal statutes* and proceedings. As a particular scandal developed, new conflict laws were enacted to address it. Scandals involving officials making unfounded claims against the government treasury or personally profiting during the US Civil War (1860s) from contracts for goods that never arrived or were defective, gave rise to a series of criminal laws designed to prohibit government officials (and those who colluded with them) from personally profiting by their involvement in government decisions and processes. The same basic prohibitions that arose from those scandals remain in effect today.

In the early 1960s there was renewed interest in public service as a respected profession, generated in part by the election rhetoric of President John F. Kennedy. This brought increased attention to the relationships that should exist between government employees and the public, and resulted in two major changes. First, the individual criminal statutes dealing with conflicts of interest were re-enacted together in one chapter of the criminal code, and standardised terms were used throughout the provisions. Second, the Kennedy Administration embarked on a project to establish an

administrative (non-criminal) code of conduct for executive branch officials that addressed not only actual conflicts of interest but also activities that give rise to the *appearance* of such conflicts. This approach was based upon a belief that the public's trust in the government was damaged whenever it appeared that a conflict of interest had occurred. Thus began a shift in focus from simply criminal prohibitions to more preventive and aspirational standards.

Following President Kennedy's assassination, in 1965 President Johnson issued Executive Order 11222 which set forth six basic principles of public service and some specific restrictions regarding gifts and other activities. The Civil Service Commission (now called the Office of Personnel Management) developed a model regulation for executive branch agencies to use in developing their own regulatory standards of conduct based on the executive order. Each agency was then responsible for interpreting and enforcing its own standards. While the Civil Service Commission did have a limited role, there really was no centralised authority responsible for ensuring consistency of the programme throughout the branch. Not surprisingly, over the next 15-20 years it became apparent that while the words of each agency's standards were similar, the application by individual agencies differed greatly.

After the Watergate scandal, a number of good governance measures were enacted in an effort to help restore the public's confidence in the government. One such measure, found in the 1978 Ethics in Government Act, was the creation of the *Office of Government Ethics*. OGE is responsible for the overall direction of executive branch policies related to preventing conflict of interest. A small agency, OGE leveraged its position by building upon the then current responsibilities of each agency head. OGE began by re-enforcing the concept that each head was ultimately responsible for the ethics programme of his or her agency. However, it then required each head to appoint an ethics official and provide sufficient resources so that that official (and any additional necessary staff) could carry out the day-to-day activities of an ethics programme composed of elements specified by OGE. As a part of its oversight responsibilities, OGE periodically reviews agency ethics programmes to ensure that they are carried out within a consistent framework. It is through this network of ethics officials that OGE began working and continues to work to bring some consistency to the programme within the branch.

In 1989, President George H.W. Bush issued Executive Order 12674 setting forth 14 *fundamental principles* of ethical service (see box below). The order directed OGE to write "a single, comprehensive, and clear set of executive branch standards of conduct that shall be objective, reasonable, and enforceable". In carrying out this directive, OGE made a conscious decision to move from the more limited regulations developed in the 1960s to more extensive, detailed regulatory standards that addressed core subjects much more specifically. The subjects chosen were those that raised the most

questions based upon agencies' years of experience with the application and enforcement of the earlier standards and criminal statutes. Each section of the standards was followed by examples of its application.[1]

The change was intended to help make interpretation among the agencies consistent; to provide more actual concrete examples and thus increase awareness among employees subject to the standards; and, importantly, to create *one set of written "government ethics" standards* that, if followed, would prevent an employee from inadvertently violating a criminal conflict of interest or civil ethics statute. In drafting the standards, every attempt was made to ensure that an employee who followed the standards need not fear that his or her conduct was in violation of a civil or criminal ethics statute. On the other hand, an employee who chose to act in significant violation of the standards would also run the risk of his or her conduct triggering an underlying criminal statute. For example, depending upon the facts, accepting or soliciting a "gift" might actually be viewed as accepting a bribe or engaging in extortion; misusing government resources might actually be criminal conversion of government property.

The standards were drafted, reviewed internally within the executive branch and published for public comment. OGE received over 1 000 comments from interested parties. These comments were addressed in writing in a preamble when the final regulation was published in August 1992. The effective date of the regulation (standards of conduct) was six months beyond publication in order to give agencies time to make their employees aware of the new code and its provisions.

These administrative standards of conduct have now been in effect for ten years. When they were new, agencies properly focused their training resources on the requirements of the standards as a minimum level of acceptable conduct. Given the passage of time, employees are now expected to be more comfortable with the standards, and OGE is exploring ways to raise the level of discourse from simple compliance to *aspiring to the highest principles* on which those standards are based.

The administrative standards of conduct are not the only aspect of the ethics programme that has changed since the 1960s. As a part of the 1989 Ethics Reform Act, the criminal statutes were amended to include the options of civil and injunctive authority. Previously, a statutory conflict of interest could only have been charged as a felony or a misdemeanour; now civil actions can be brought and injunctions sought for the same conduct, giving prosecutors a wider range of options to address statutory violations.[2] In addition, Congress enacted some civil ethics restrictions applicable to high-level officials of all three branches that limit outside earned income, compensated and uncompensated service in certain fiduciary positions, and

the receipt of honoraria.[3] These restrictions were enacted in conjunction with a significant pay rise to relieve the pressure to accept private compensation in order to meet the expenses of living and working in Washington.

Thus, over the last 40 years the US Federal Government has moved away from purely criminal conflict-of-interest restrictions as the primary standard governing public service. Now there are civil "ethics" restrictions primarily dealing with outside activities that produce compensation; conflict-of-interest statutes that provide the prosecutor with criminal or civil options for penalties; and, in the executive branch, comprehensive administrative standards of conduct designed to be a single source of guidance to employees with regard to all conflicts and ethics restrictions.

D. Elements of the executive branch ethics programme

The elements of the executive branch ethics programme include a core of enforceable statutory and regulatory standards; systems for publicly available and confidential financial disclosure reports; systematic training and counselling; and a functioning enforcement system.

Enforceable standards

"Conflict of interest" is not defined as a single term in the laws and regulations that make up the core restrictions and ethics principles applicable to officers and employees of the executive branch. Rather, a variety of circumstances, described by individual statutes and regulations, can create a conflict of interest.

The *criminal conflict-of-interest prohibitions* (which have their bases in laws over a century old) apply to the following types of conduct:

- The acceptance or demand by and/or the payment to a public official of something of value in exchange for an official act, for or because of an official act, or for certain witness fees (bribery and criminal gratuities restrictions of 18 USC. § 201).
- The acceptance of and/or payment to an officer or employee of compensation for representations made by the officer or employee in an unofficial capacity or by another to any federal agency or court in a matter in which the United States has an interest (18 USC. § 203).
- Uncompensated representations by certain officers or employees in an unofficial capacity to any federal agency or court on a matter in which the United States has an interest, and the payment to and acceptance by an officer or employee of compensation for assisting another in a claim against the United States (18 USC. § 205).

- An executive branch employee's taking an official action in a particular matter in which:
  - ❖ The employee.
  - ❖ The employee's spouse.
  - ❖ The employee's minor child.
  - ❖ The employee's general partner.
  - ❖ An organisation in which the employee serves as an officer, director, general partner, trustee or employee; or
  - ❖ An organisation with whom the employee is negotiating or has an arrangement for future employment.

  has a financial interest (the criminal self-dealing restriction of 18 USC. § 208).
- The acceptance of and/or payment to an executive branch officer or employee of any salary or salary supplement as compensation for official duties (18 USC. § 209).
- The representation of others before the government by former executive and legislative branch officers or employees on a variety of matters (the post-employment restrictions of 18 USC. § 207).

Conduct that violates these restrictions may be prosecuted criminally as a felony or a misdemeanour with possible incarceration and/or monetary fines, or as a civil case with only monetary fines.

The *civil ethics statutes* have a much more recent history. They were enacted in response to concerns for the outside compensated activities of members of Congress, judges and the most senior non-career executive and legislative branch officers and employees. The most recent version of the restrictions was imposed in conjunction with a substantial pay rise for these senior officials. Restrictions include:

- A limitation on the amount of income that can be "earned" outside of government duties by these senior officials (5 USC. app. § 501).
- A prohibition[4] on the receipt of any compensation for:
  - ❖ affiliating or being employed by a firm, partnership, association or other entity that provides professional services involving a fiduciary relationship;
  - ❖ permitting one's name to be used (even without compensation) by any such firm, partnership, association, corporation or other entity;
  - ❖ practicing a profession that involves a fiduciary relationship;
  - ❖ serving as an officer or other member of the board of any association, corporation or other entity; or
  - ❖ teaching without the prior notification and approval of the appropriate government ethics oversight body.

A statutory prohibition on the receipt of honoraria by any government official (enacted at the same time as the two noted above) was held unconstitutional by the Supreme Court, as the law would apply to a certain class of employees. Based upon the written opinion of the Court, the Department of Justice determined that the prohibition was also unenforceable as to employees outside this class. The restriction remains as a rule of the United States House of Representatives and the United States Senate.

The administrative Standards of Conduct for Employees of the Executive Branch are based upon *14 Principles of Ethical Conduct* set forth in Executive Order 12674. These standards replaced those based upon Executive Order 11222 of 1965. A President may issue executive orders concerning conduct based on constitutional authority over the officers and employees of the executive branch. The principles from Executive Order 12674 are:

Box 23. **General principles for the United States Executive Branch**

1. Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain.
2. Employees shall not hold financial interests that conflict with the conscientious performance of duty.
3. Employees shall not engage in financial transactions using non-public government information or allow the improper use of such information to further any private interest.
4. An employee shall not, except pursuant to such reasonable exceptions as are provided by [OGE] regulation, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or non-performance of the employee's duties.
5. Employees shall put forth honest effort in the performance of their duties.
6. Employees shall not knowingly make unauthorised commitments or promises of any kind purporting to bind the government.
7. Employees shall not use public office for private gain.
8. Employees shall act impartially and not give preferential treatment to any private organisation or individual.
9. Employees shall protect and conserve federal property and shall not use it for other than authorised activities.

Box 23. **General principles for the United States Executive Branch** *(cont.)*

10. Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official government duties and responsibilities.
11. Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.
12. Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those – such as federal, state, or local taxes – that are imposed by law.
13. Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, colour, religion, sex, national origin, age, or handicap.
14. Employees shall endeavour to avoid any actions creating the appearance that they are violating the law or the ethical standards promulgated pursuant to this order.

The standards of conduct derived from those principles are enforced by administrative sanction that can include reprimand, suspension, demotion or dismissal. Employees are also directed to continue to apply the principles in situations that may not clearly be covered by the standards, and the principles are made a part of the standards. The specific subjects covered by the standards of conduct are:

- Gifts from outside sources.
- Gifts between employees.
- Conflicting financial interests.
- Impartiality in performing official duties.
- Seeking other employment.
- Misuse of position, which includes:
  - ❖ use of public office for private gain;
  - ❖ use of non-public information;
  - ❖ use of government property; and
  - ❖ use of official time.
- Outside activities.

The standards of conduct were written with the goal of providing executive branch employees with one source of guidance that, if followed,

would help the employee avoid a violation of the criminal and civil statutes listed previously.

In addition to the standards of conduct that are applicable to every executive branch employee, agencies could, with the approval of the Office of Government Ethics, develop more specific restrictions for all or a portion of those employees. The following are examples of *mission-related conduct restrictions* that have been approved:

1. *Customs employees* may not be employed by a customs broker, international carrier, bonded warehouse, foreign trade zone, cartman[5] or law firm engaged in the practice of customs law or the importation department of a business, nor be employed in any private capacity related to the importation or exportation of merchandise (5 C.F.R. § 3101.110).
2. *Tax officials* of the Internal Revenue Service (IRS):
   - Shall not recommend, refer or suggest any attorney or accountant (or firm of either) to any person(s) in connection with any official business which may/involves the IRS; and
   - May not be involved in the following types of outside employment or business activities which are prohibited and shall constitute a conflict with the employee's official duties:
     - ❖ Performance of legal services involving federal, state or local tax matters.
     - ❖ Appearing on behalf of any taxpayer as a representative before any federal, state or local government agency in an action involving a tax matter, except with the written authorisation of the head of the IRS.
     - ❖ Engaging in accounting, or the use, analysis and interpretation of financial records when such activity involves tax matters.
     - ❖ Engaging in bookkeeping, the recording of transactions or the record-making phase of accounting when such activity is directly related to a tax determination.
     - ❖ Engaging in the preparation of tax returns in exchange for compensation, gift or favour. (5 C.F.R. § 3101.106)
3. *Prosecutors* and other officers and employees of the Department of Justice may not engage in outside employment that involves:
   - The practice of law, unless it is uncompensated and in the nature of community service, or unless it is on behalf of himself, spouse, children or parents.
   - Any criminal or habeas corpus matter, be it federal, state or local.

- Litigation, investigations, grants or other matters in which the Department of Justice is or represents a party, witness, litigant, investigator or grant-maker.

The statute and regulations noted above are not the sole sources of restrictions or guidance for the performance of official duties. Quite the contrary, there are a significant number of statutes and regulations directed at ensuring that employees do not engage in activities that will undermine the full and proper exercise of their official duties. The statutes and regulations noted above are administered as part of other programmes that are complementary to the ethics programme and upon which the ethics programme builds. A selected listing of subjects covered by other prohibitions follows:

- Fraud or false statements in a government matter.
- Acceptance or solicitation of anything of value to obtain appointive public office for another.
- Acting as an agent of a foreign principal.
- Embezzling, stealing, purloining or converting public money, property or records.
- Disclosure of classified, proprietary and other confidential information.
- Lobbying with appropriated money.
- Failing to account for public money.
- Solicitation of political contributions under certain circumstances.
- Misuse of government-paid postage.
- Counterfeiting or forging transportation requests.
- Concealing, mutilating or destroying a public record.
- Unauthorised use of documents relating to claims from or by the government.
- Interference with civil service examinations.
- Maintaining, disclosing or requesting or obtaining certain personal records under certain circumstances.
- Disloyalty and striking.
- Excessive use of intoxicating beverages.
- Misuse of appropriated funds or government vehicles.
- Political activities.
- Retaliation against whistleblowers.
- Participation in the appointment or promotion of relatives.
- Arbitrary and capricious withholding of public records.

While it is critical that government officials have standards of duty owed to the public, the burden of governmental processes free from taint is not borne solely by the government official. Those in the *private sector* who deal with the government must also adhere to certain standards. As noted above, many of the criminal conflict-of-interest statutes, 18 USC. §§ 201-209 as well as many others, apply to the conduct of the private sector individual or organisation dealing in association with the government employee. Further, under the *Federal Sentencing Guidelines*, private sector entities found guilty of illegal conduct may receive reduced sentences if they have an established ethics programme recognised under the federal requirements. Many private sector entities have established these programmes as a consequence. In addition, the *Foreign Corrupt Practices Act* established in 1977 prohibits US corporations from paying bribes to foreign public officials. The prohibitions contained in that Act provide guidance to the private sector on what kinds of activities are impermissible in their dealings with foreign officials.

Publicly available and confidential financial disclosure reports

Executive Order 11222 of 1965, which established the first branch-wide administrative standards of conduct, also required high-level executive branch officials to file *confidential financial disclosure reports* with the Civil Service Commission. In addition, the Commission was directed to issue regulations requiring confidential financial disclosure reports from other agency employees in order to help determine potential, actual or apparent conflicts of interest of the officers and employees. Each agency initially collected and reviewed these forms before sending copies of the senior officials' forms to the Commission. And, like the first standards of conduct, agencies managed this programme in differing ways. Some agencies collected the reports and used them constructively to help counsel employees on how to avoid potential conflicts that were disclosed on the reports. Other agencies failed to collect or to properly review the reports, or to use them as a counselling tool.

This experience was one of the considerations of Congress when, as a part of the 1978 *Ethics in Government Act*, it enacted the statutory requirement that high-level officials of all three branches file *publicly available financial disclosure reports*. The publicly available financial disclosure report was intended and continues to:

- Increase public confidence in government.
- Demonstrate the high level of integrity of the vast majority of government officials.
- Deter conflicts of interest from arising because official activities would be subject to public scrutiny.

- Deter persons whose personal finances would not bear public scrutiny from entering public service.
- Better enable the public to judge the performance of public officials in light of an official's outside financial interests.

The information required to be reported is quite specifically set out by law, and the information requested is directly related to conflict-of-interest statutes or regulations.[6] In general, however, the information required to be reported, with minimum threshold triggers, is as follows:

- *Sources and amounts of income*, both earned (by exact amount) and investment (by specific categories of amount).
- *Assets* and their values reported by categories of amount.
- *Liabilities*, their terms and the highest amounts owed during the reporting period, reported by categories of amount.
- *Gifts and reimbursements* accepted during government service with their values or amounts.
- *Fiduciary and employment positions* held outside the government with the dates the positions have been held.
- *Agreements and arrangements* regarding future employment, leaves of absence, continuing payments from or participation in a benefits plan of a former employer, with dates and details.
- For first reports only, the names of *major clients* (persons or organisations for whom personal services were performed for compensation in excess of a specified threshold amount).

The filer must also report assets, certain income, liabilities and some gifts of the filer's spouse and dependent children. The publicly available reports are filed upon entry into government service, annually thereafter, and upon termination of government service. There are approximately 20 000 filers of public reports within the executive branch alone.

The public financial disclosure requirement is also used as a *preventive measure* in the confirmation process of the President's nominees to the highest positions in the executive branch. Each of the nominees is required to file a publicly available financial disclosure report no later than five days after nomination. In practice the reports are completed quite early and given to the White House. The information contained on the report is a factor in the President's decision whether to nominate the individual for a particular position. The reports are shared by the White House, OGE and the agency in which the individual would serve. When the individual is nominated, the agency conducts a final review and forwards a final copy to OGE, who then certifies the report and sends an opinion letter to the Senate. OGE recognised this as an opportunity to review with the agency and the White House the

financial holdings and relationships of a nominee, and to require the nominee to agree to take whatever steps are necessary to avoid potential conflicts before he or she assumes the new position. These steps, explained more fully later, can include divestiture, resignation from outside positions, recusal, waiver or a blind trust.

The critical step OGE took in 1979, one not clearly set forth in the financial disclosure statute, was to work with each of the Senate confirming committees to ensure that OGE could complete this review before the Senate confirmed the individual. Doing so offered two advantages. The first was time; normally, confirmation must occur before appointment. The second was consistency. Historically, each Senate confirming committee had made its own decisions about financial conflicts, and not necessarily based upon applicable laws and regulations. By providing its analysis and opinion to the committees, OGE could shoulder more of this responsibility and the committees could focus on suitability rather than financial conflicts. Thus, OGE's review and opinion have become an integral part of the confirmation/appointment process, and new appointees are now aware before they take office of the conflict-of-interest requirements to which they must adhere. This process is one of the most important conflict prevention tools for senior-level officials available in the programme.

Public financial reporting helps ensure that every citizen can have confidence in the integrity of the most senior officials of the federal government. However, in order to further guarantee the efficient and honest operation of the government, the executive branch continues to require other, less senior employees whose duties involve the exercise of significant discretion in certain sensitive areas to report, on a confidential basis, their financial interests and outside business activities to their employing agencies. These confidential reports facilitate the agency's review of possible conflicts of interest and provide a vehicle on which to base individualised ethics counselling and training. Approximately 255 000 individuals file financial disclosure reports on a confidential basis throughout the executive branch.

The declaration of a financial interest or an affiliation does not in itself resolve a conflicting situation. Additional steps must be taken, including:

- *Divestiture:* an official agrees to dispose of a conflicting interest, such as selling an asset or returning a gift. Officials are expected to decline gifts or benefits that either raise or appear to raise conflict-of-interest issues, or voluntarily return gifts that are problematic.
- *Waiver* of the potential conflict if the government determines in a public, written document that the financial interest is not so substantial as to be deemed likely to affect the services of the individual in a given matter, or

that the matter's effect on the employee's financial interest is too remote or too inconsequential.

- *Transfer of duty:* officials can either recuse themselves (non-participation) on an individual matter or can be reassigned to a new position.
- *Resignation:* an official may be requested to resign from a private position in order to continue to act in matters that may affect the organisation; or, in rare instances, an official may decide to refrain from government employment or resign in order to retain a private position or financial interest.
- *Voluntary "blind trust":* placing all financial assets under the trusteeship of a neutral third party pursuant to strict OGE guidelines.

A very important feature of the procedures used to resolve conflict-of-interest situations is the attempt to ensure the *transparency* and scrutiny of decisions. When the government determines to "waive" a conflict, it is done through a written public document. If an individual agrees to recuse on certain matters and the agreement is put in writing, that document is generally publicly available (as are most documents supporting executive branch decisions). The transparency of the system empowers the public to exercise their rights as citizens and contributes to a culture of accountability and integrity that is integral to democratic governance. Another basic characteristic of the system is that the financial disclosure report is a basis upon which employees may be given personalised training and counselling.

While prevention of conflicts is a significant purpose of collecting and reviewing these disclosure reports, the reports can also be used to help in prosecutions of individuals who have violated conflicts or other statutes. In some instances, the employee will disclose information that, on the face of it, indicates a violation of a statute or regulation. The form is then used as a basis for further investigation and for possible prosecution. In other instances, information will become available about activities and interests of the employee that a subsequent investigation reveals the employee has intentionally failed to report properly. In those cases, the employee can be charged criminally with knowingly filing a false statement on the financial disclosure report. This charge would be in addition to whatever other charges might be involved; it is especially useful when the proof of the underlying illicit act is difficult to obtain or prove in a court proceeding, while the proof of the false statement on the report is not.

Systematic training and counselling

One of the real strengths of the ethics programme of the executive branch is the systematic training of employees with regard to the regulatory standards and the conflict-of-interest statutes. In the executive branch,

agencies are required to provide this training to the highest-level officials once a year. All new employees must be given an opportunity to familiarise themselves with the standards of conduct when entering government service. In addition, every agency has an ethics official or officials available in person, over the telephone, or via email to answer any questions employees might have about application of the statutes or standards. Supervisors and managers are also available to help direct an employee to the designated ethics officials. Employees who in good faith seek advice from these ethics officials and follow that advice (even if the advice turns out to be wrong) will not suffer any penalty for their conduct. This aspect of the programme is intended to encourage employees to ask questions before they engage in conduct about which they are unsure.

In a recent survey of a cross-section of executive branch employees, OGE found that employees who had received ethics training were more aware of the ethics requirements and more apt to seek guidance when questions arose. Not surprisingly, the survey showed that employees judged the ethical culture of their agencies by the actions of their immediate supervisors and their executive leadership.[7] To OGE this was a clear indication that more training resources should be directed to those in supervisory positions.

Experience has also shown that as training increases, so does the use of counselling services; the two go hand in hand. The training sessions are intended to raise the consciousness of employees to the issues that can pose questions of conflict. If the employee subsequently has a question that is not clearly answered to his or her satisfaction by the written standards, the employee is strongly encouraged to seek assistance from an agency ethics counsellor prior to engaging in the conduct that is of concern. Individual employee counselling is provided primarily at the agency level, where there is likely to be a more direct understanding of the employee's responsibilities in the programmes administered by the agency. (OGE's training and counselling, which is more detailed and specific, is primarily provided to agency ethics officials.)

Effective enforcement mechanisms

Each agency has the primary responsibility of determining which measures should be applied to resolve a potential conflict of interest on the part of an employee in that agency. Agencies must also seek an appropriate investigation where a conflicting act on the part of the official has already occurred.

The criminal and civil statutes and the standards of conduct are enforced using *standard procedures* that are not unique to these restrictions and did not have to be designed specifically for them. When confronted with an allegation

of abuse, the agency can turn to its independent Inspector General (IG) for investigation or, if the agency is small and without an IG, it can make arrangements to "borrow" an investigator from another agency. An agency can also refer potential criminal conduct to the Department of Justice for investigation. If an official engages in misconduct that violates only the administrative standards of ethical conduct for executive branch employees, the agency is responsible for instituting administrative penalties against the official according to standard procedures. If the misconduct violates a civil or criminal statute, the Department of Justice is responsible for pursuing those matters through the courts. An official may be subject to both administrative and civil or criminal sanctions for the same conduct.

Prior to 1989, only the most serious cases were prosecuted; less serious violations of the criminal conflicts laws were not pursued for reasons related to such things as balancing prosecution resources and jury appeal. With the 1989 addition of civil penalties and injunctive relief, and with the proactive ethics programme having been in existence for ten years, the Department of Justice began to pursue more conflict allegations. Faced with the real possibility that actions would be brought against them, individuals under investigation began offering to settle the cases with a civil monetary payment. The payment was determined with reference to the amount of the fine that could have been imposed upon a finding of guilty. Each settlement concluded with a written public statement containing both the government's and the employee's views of the employee's conduct. These settlements achieved timely disposal of issues that might otherwise have required lengthy and complex investigations. They also have had the salutary effect of indicating to the public and to employees that the statutes are to be taken seriously. Furthermore, they provide an extremely useful tool in educating employees, using specific cases often involving identifiable high-level officials.

There are *reporting systems* among agencies involved in prevention, investigation and prosecution efforts for conflict-of-interest enforcement. In some instances, this information is made available to the public. The media play an active role in informing the public of the results of investigations into these matters and the prosecutions of officials. Each year OGE also publishes a description of all prosecutions as well as all civil settlements. That document is sent to all ethics officials and posted on OGE's website for public review.[8]

The regulatory standards of conduct are enforced administratively by the agency in which the employee serves, using standard procedures that must be followed in order to take any disciplinary action against the employee.[9] It is also possible to impose civil penalties and take measures such as injunctive relief and the cancellation of the affected decision (as determined by various

statutes – for example, 18 USC. § 218). The standards of conduct do not have to include a detailed enforcement mechanism; they simply refer to the existing system for taking disciplinary actions against employees. Enforcement authority has consciously been made the responsibility of the head of each agency as an effective management tool, and as a way of holding the head of the agency accountable for its standards. OGE reviews each agency's ethics programme generally on a four- to five-year cycle to determine whether it is being carried out properly.

E. Recent developments: Challenges and directions

The widening variety of financial investment instruments and the diverse business lines within individual corporations continue to raise new issues when determining whether a particular financial investment will create a conflict with the duties of the official who might own it. In addition, the desire to downsize the government continues to create tensions with the conflict-of-interest statutes. Those in the government who might well be in the best position to help it contract or devolve certain of its responsibilities may also be in the best position to carry out those responsibilities in the private sector. This creates an inherent tension: questions of objectivity (when officials whose jobs will be affected are allowed to make the decisions) or competence (when they are not and others with possibly less knowledge or expertise step in to make the decisions) can frequently arise.

Conflict-of-interest policy and guidance has also been affected by litigation. Long-standing statutes and an OGE regulation have been challenged as unconstitutional or as misapplied in a prosecution, and have resulted in court opinions requiring a change in guidance and/or regulation. This includes litigation involving honoraria, criminal gratuities (as opposed to the OGE gift rules, which were not affected), and travel expenses reimbursed to employees for trips to speak unofficially about their areas of official responsibilities.

The requirements for public financial disclosure by the highest officials of all three branches of Government are now 25 years old. Investment patterns and financial relationships have changed significantly during this period. Originally as a way to help streamline the Presidential nominee process, the Office of Government Ethics undertook a review of the financial disclosure requirements in order to make recommendations regarding changes in the disclosure law that would reduce strictly technical aspects of the public reporting system without diminishing programme effectiveness. In July 2003, OGE submitted a legislative proposal to the Congress that would amend the public reporting requirements. The proposal maintains the current system that the requirements for reporting will be the same for all senior officials of the Government, regardless of the branch in which they serve. This legislative

proposal could be taken up at any time during either or both sessions of the 108th Congress. The second session of this Congress is anticipated to conclude in the fall of 2004.

The Office of Government Ethics has also undertaken a study of the criminal conflict-of-interest statutes as they apply to the executive branch and is beginning a review of the standards of conduct. Finally, OGE continues to study new ways of measuring the effectiveness of the executive branch ethics programme. In short, that programme – while maintaining core requirements – continues to adapt and to change, based upon experience.

Notes

1. The *Standards of Ethical Conduct for Employees of the Executive Branch* are found in Part 2635 of Title 5 of the Code of Federal Regulations. These standards together with the examples can be accessed on OGE's website at *www.usoge.gov/pages/forms_pubs_otherdocs/forms_pubs_other_pg2.html*
2. These conflict-of-interest statutes can be accessed on the website of OGE at: *www.usoge.gov/pages/laws_regs_fedreg_stats/statutes.html*
3. See 5 USC. App § 501 et seq.
4. See 5 USC. App. § 502.
5. A bonded carrier that is generally licensed by Customs for transporting goods under Custom's authority.
6. The forms currently used in the executive branch for public financial disclosure reports and confidential financial disclosure reports can be accessed on OGE's website at: *www.usoge.gov/pages/forms_pubs_otherdocs/forms_pubs_other_pg3.html*
7. The full results of this survey and a copy of the survey instrument can be found on OGE's website at *www.usoge.gov/pages/daeograms/dgr_files/2001/do01007.pdf*
8. The results of former Conflict of Interest Prosecution Surveys can be viewed at: *www.usoge.gov/pages/laws_regs_fedreg_stats/other_ethics_guidance.html*
9. Administrative sanctions for a violation of the standards of conduct can include reprimand, reassignment, suspension, demotion or dismissal.

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