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**AVOIDING CONFLICT OF INTEREST IN POST-PUBLIC EMPLOYMENT:
COMPARATIVE OVERVIEW OF PROHIBITIONS, RESTRICTIONS AND
IMPLEMENTING MEASURES IN OECD COUNTRIES**

Expert Meeting on Managing Conflict of Interest in the Public Service

**26-27 January 2006
Château de la Muette, Paris**

This paper supports discussions in Session II by providing a comparative overview on the range of prohibitions, restrictions and their application to avoid conflict of interest in post-public employment.

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TABLE OF CONTENTS

Introduction	3
1. Setting standards: prohibitions and restrictions.....	3
1.1. Concerns and objectives	3
1.2. Types and scope of prohibitions and restrictions.....	5
1.3. Time limits.....	8
1.4. Formal sources of prohibitions and restrictions.....	10
2. Arrangements for implementation.....	12
2.1. Making officials aware of prohibitions.....	12
2.2. Application of prohibitions and restrictions: Procedures for decisions	13
2.3. Enforcement and sanctions	19
3. Reviewing and updating prohibitions and their implementation.....	21
4. Summary of preliminary findings	23
Questions for discussion.....	23

Boxes

Box 1. Reasons to develop the Post-Employment Guidelines for the Public Service in Norway.....	4
Box 2. Post employment prohibitions for public officials in Mexico	6
Box 3. Specific post-employment prohibitions for procurement, contract management and financial regulators in the United States.....	8
Box 4. One year “cooling off” period for executives in the Canadian Public Service.....	10
Box 5. Providing information on post-employment in the United States	14
Box 6. Gathering information for decision: Consultation in Germany	15
Box 7. Procedure for decisions in Spain	16
Box 8. Factors for reducing the time limits in Canada.....	17
Box 9. Measures supporting implementation in the United States	19
Box 10. System of sanctions in Italy.....	20
Box 11. Prevention and enforcement by counselling and oversight in the United States.....	23

AVOIDING CONFLICT OF INTEREST IN POST-PUBLIC EMPLOYMENT: COMPARATIVE OVERVIEW OF PROHIBITIONS, RESTRICTIONS AND IMPLEMENTING MEASURES IN OECD COUNTRIES

Introduction

Post-public employment was identified as an emerging risk area at the public-private sector interface by the Public Governance Committee at its 31st session. The Committee called for a review of arrangements in place in OECD countries for ensuring effective application of rules and policies to avoid conflict of interest when officials leave public office and – either temporarily or permanently – work in the private or not-for-profit sectors.

This paper provides a comparative overview on the range of prohibitions and restrictions for post-public employment and implementing measures to avoid conflict of interest in post-public employment. Participants are invited to review, in particular:

- What standards are considered necessary in post-public employment to maintain trust in government and public decision making? How could common standards for the whole public sector also take into consideration specific positions and situations?
- How to achieve compliance? What measures could successfully prevent, resolve or manage conflict-of-interest situations in post-public employment?

The results of the discussion, in particular identified policy challenges and good practices, will be included in the draft report to be submitted to the Public Governance Committee.

1. Setting standards: prohibitions and restrictions

1.1. Concerns and objectives

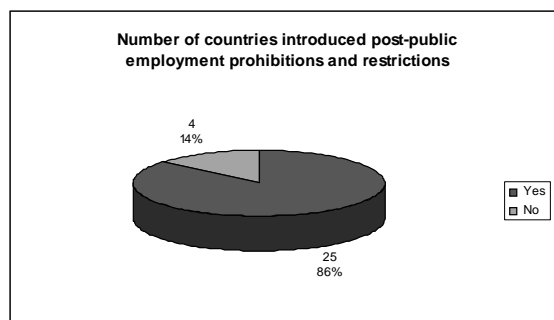
Citizens trust public officials because they are expected to serve the public interest. But what happens when a public official leaves their office? The **immediate concern** across OECD countries is the potential misuse of sensitive official information for the **illicit benefit** of former public officials and avoiding the suspicion of rewarding past decisions benefiting the prospective employer.

In addition to the personal aspect, countries also face potential **political and economic consequences**:

- Economic – unfair competition by benefiting market players that improperly employ former public officials.
- Political – losing confidence in government.

These concerns have driven governments to develop laws and policies on post-public employment. As the first figure¹ shows the vast majority of OECD countries set out prohibitions and restrictions for post-public employment. The fact that 25 countries set out prohibitions and restrictions is particularly noticeable as countries in general have liberalised their labour market in the past several years.

Figure 1. Post-public employment prohibitions and restrictions



Very few countries indicated the absence of general prohibitions and restrictions for post-public employment. Amongst them, the Czech Republic had already introduced restrictions in March 2005 that were annulled later by the Constitutional Court whereas Hungary is to carry out an analysis of the current situation at the next review of civil service regulations. In Finland a recent survey in State agencies showed no need for specific restrictions because existing general standards on official secrecy and current accountability framework were considered sufficient.

Box 1. Reasons to develop the Post-Employment Guidelines for the Public Service in Norway

Although State administrative agencies do not regularly operate in a competitive market, they may have justifiable needs for post-employment clauses in the employee's contracts similarly to private sector companies. The following three special factors were considered in the preparation of the Post-Employment Guidelines for the Public Service:

- *The need to protect internal information* -- The State must seek to prevent other organisations from gaining knowledge about an administrative agency's strategy and plans, e.g. on the formulation of policy and rules. Such knowledge could result in illegal competitive advantage.
- *The need to protect other organisations' trade secrets* -- The State must seek to prevent an organisation from gaining access to confidential information about other organisations, including trade secrets, etc. Such knowledge could also result in illegal competitive advantage.
- *The need to safeguard public confidence in the public service* -- The State administrative agencies must seek to prevent suspicions that a civil servant has taken advantage of his or her position to gain special advantages for an organisation. Such suspicions could weaken public confidence in the integrity and impartiality of the administration.

These concerns might justify actions such as "*temporary disqualification*" and/or "*abstinence from involvement in certain cases*"².

Source: Designing and implementing post-public employment regulations for civil servants and politicians: The Norwegian initiative, GOV/PGC/ETH(2006)4

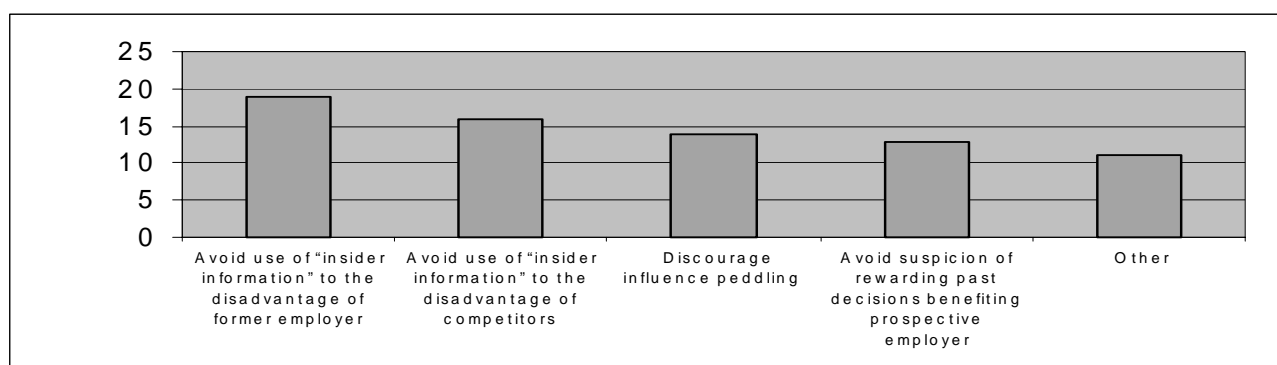
¹ All figures in this paper are based on responses received before 20 January from 29 member countries to the OECD Country Information Sheet on Managing Conflict of Interest, GOV/PGC/ETH(2005)4.

² For definitions and further details see p. 4 at "Designing and implementing post-public employment regulations for civil servants and politicians: The Norwegian initiative", GOV/PGC/ETH(2006)4.

As with the Norwegian concerns, the **primary objective** of post-public employment prohibitions and restrictions is to avoid use of “insider information”³ to the disadvantage of both former employers in the public sector and potential competitors in the private sector. In Belgium, restrictions are related to information on national security, public order, financial interests, medical secrets, respect of privacy, citizen’s rights and freedom, and preparation of decisions until the decision is final⁴.

The majority of OECD countries also aims at discouraging influence peddling as well as avoiding suspicion of rewarding past decisions benefiting prospective employer by minimising the possibility of using public office to unfair advantage in obtaining opportunities for outside employment.

Figure 2. Objectives of post-public employment prohibitions and restrictions



In addition, several countries identified overall aims to keep confidence in public service and public officials (Germany, Japan, United States), and to avoid misuse of public office and corruption (Japan, Spain, Slovakia). More specifically, the “cooling-off” restrictions also provide a learning period for both former officials and those in the government to become used to their new relationship vis-à-vis one another, and ensure that decisions on matters on which a former official may represent someone are not influenced on the basis of animosity (United States).

1.2. *Types and scope of prohibitions and restrictions*

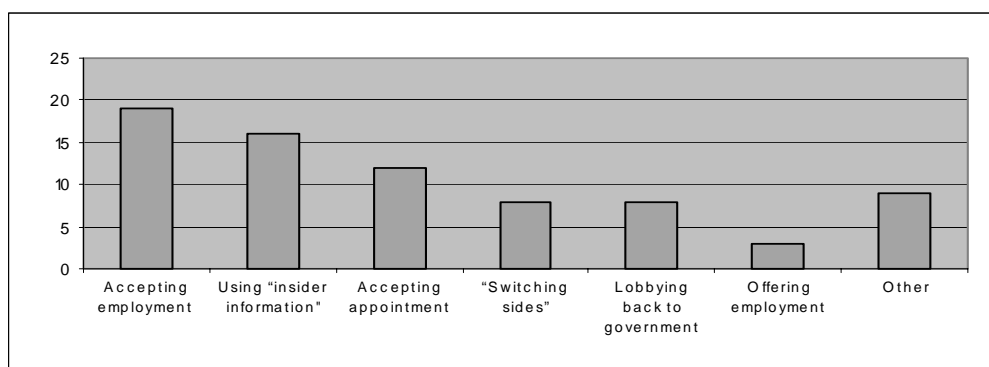
Prohibitions and restrictions predominantly **focus on officials** leaving public office. Very few countries (France and the United States) impose restrictions in the criminal code for the potential or new employer of former public officials.

Principally, prohibitions related to accepting future employment or appointment (e.g. to board of directors, advisory or supervisory bodies, etc.) and misusing “insider information”. Few countries apply specific restrictions for “switching sides”⁵ and lobbying back to government.

³ Information not available to the public, either classified government information (e.g. on policy intention) or commercially sensitive information (e.g. trade secret).

⁴ See Article 10, Statute of State Officials.

⁵ Former public officials change sides in an ongoing procedure or negotiation to represent the opposite party in a contentious issue.

Figure 3. Types of prohibitions and restrictions

The majority of countries apply the same rules on general prohibitions and restrictions to all public officials. Certain prohibitions are even criminalised in penal codes, including:

- The breaches of professional secrecy in Denmark and France.
- Negotiating for employment and violating post-employment restrictions in the executive branch of the United States.

Box 2. Post employment prohibitions for public officials in Mexico

The Federal Law on Public Officials' Administrative Responsibilities in Mexico⁶ extends the application of general conflict-of-interest provisions⁷ for one more year after public officials leave their functions. The Law also establishes the following specific prohibitions for one year after leaving public office:

- "In no case will he use his influence or obtain any advantage derived from the function he performed, for himself or for his spouse or blood relatives up to the fourth degree, his in-laws, or for third parties with whom he has professional, labour or business relations, or for partners or companies that the public official or the above-mentioned persons are or have been a part of.
- He will not make advantageous use for his own or another's benefit, of the information or documentation he has had access to during his employment or commission and that is not within the public domain."

Additional restrictions exist for specific groups leaving for other public organisations, namely:

- Public officials holding top-level management posts in the Federal Electoral Institute, its Board Members, and the Magistrates of the Federal Judicial System's Electoral Court should abstain from participating in any public office of the administration that is headed by whoever won the election that they organised or processed.
- Heads of internal control units in the federal agencies and entities, and in the Attorney General's Office, as well as heads of auditing and complaints must abstain from accepting employment in the public institution they supervise, evaluate, investigate and control in order to avoid incurring conflicts of interest⁸.

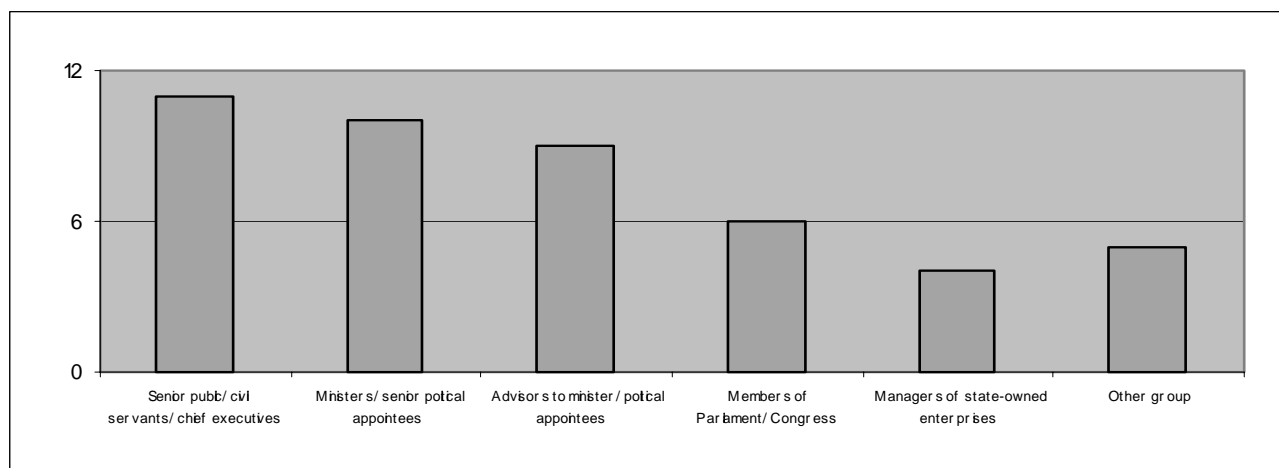
⁶ Article 8 and 9, paragraph XII of the Federal Law on Public Officials' Administrative Responsibilities.

⁷ Public officials shall abstain from soliciting, accepting or receiving personally or through other person, money, personal or real property via transfer at a price much lower than in the market, donations, services, employment, offices or commissions for themselves personally or for individuals with whom they have family, personal or business relations, that originate from any individual or legal entity whose professional, commercial or industrial activities are directly tied to, regulated or supervised by the public official involved, in the performance of employment and that implies conflict of interest.

⁸ This standard was issued by the Minister of Public Administration in Official Bulletin No. SP/100/0329/2003 on 30 May 2003.

Whereas restrictions differ according to the level of officials in a few countries (e.g. the more senior the official, the more stringent the restriction in Korea and the United States), a minority of responding countries (twelve countries) employ prohibitions and restrictions specifically designed **to certain categories** of public officials. As the following figure indicates, specific prohibitions and restrictions are predominantly focused on top decision makers, including politicians, their advisors, senior civil/public servants and chief executives:

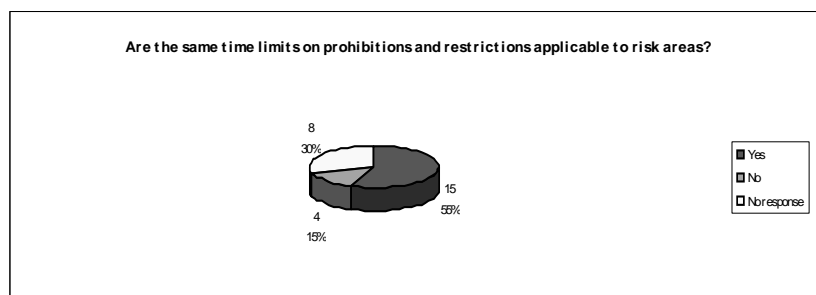
Figure 4. Officials with specific post-public employment prohibitions and restrictions



The Post-Employment Guidelines for Politicians have been applied for the prime minister, ministers, state secretaries and political advisers in Norway⁹. The Spanish Code of Good Government and Bill on Conflicts of Interest cover high-ranking officials, including the cabinet members and state secretaries, whereas similar rules are used at the sub-national level by the autonomous communities. In Italy, in addition to “holders of government office”, including members of government, deputy ministers, undersecretaries and extraordinary government commissioners, specific prohibitions are applied to at-risk areas such as regulators in the telecom and energy sectors, as well as for members of the National Centre for Government Information Technology. Further specific restrictions are applied in procurement and contract management for officials overseeing public works in Italy.

However, this approach is rather the exception than the rule. As the following figure indicates, OECD countries have **not developed specific prohibitions and restrictions for risk areas**; instead the same rules are applied in general.

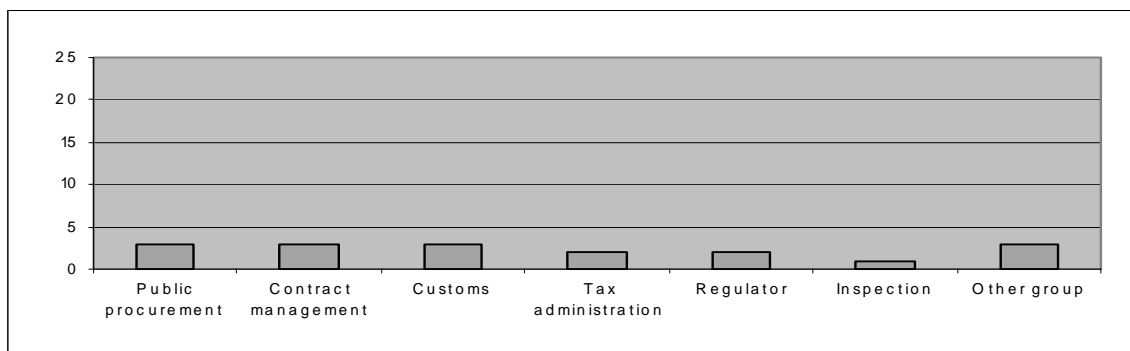
Figure 5. Application of specific rules in risk areas



⁹ Further details on the application of the Guidelines can be found at “Designing and implementing post-public employment regulations for civil servants and politicians: The Norwegian initiative”, GOV/PGC/ETH(2006)4.

A stricter regime is applied for supervisory and regulatory agencies (e.g. competition, energy, nuclear security, etc) as well as for the board of rectors in Spain. Specific restrictions are employed for police and fire departments in Korea and every public official handling or using federal public funds in Mexico.

Figure 6. Risk areas with specific prohibitions and restrictions



Box 3. Specific post-employment prohibitions for procurement, contract management and financial regulators in the United States

In addition to the generally applicable post-employment restrictions for federal employees in the executive branch, there are certain post-employment prohibitions in place for those involved in procurement functions and contract administration, and for certain officials in the financial institution regulatory agencies.

Procurement and contract administration – former officials may not accept compensation from a contractor for one year as an employee, officer, director or consultant of the contractor if they:

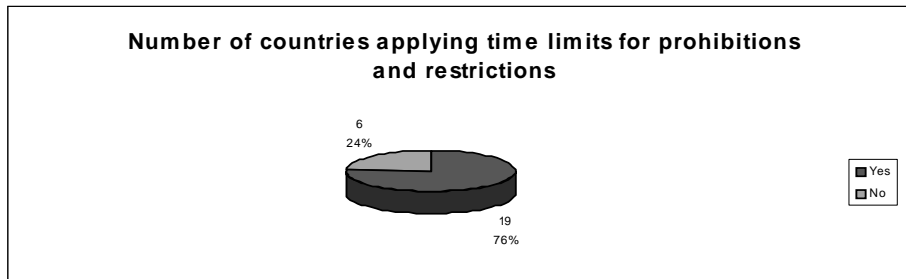
- Served, at the time a contract exceeding USD 10 million was awarded as a procuring contracting official, or a source selection authority, or a member of the source selection evaluation board, or chief of a financial or technical evaluation team; or
- Served, for a contract exceeding USD 10 million as administrative contracting officer, or programme manager or deputy programme manager; or
- Personally made a decision to award a contract, subcontract, task order or delivery order over USD 10 million, establish overhead or other rates in excess of USD 10 million; approve issuance of contract payment(s) in excess of USD 10 million, or pay or settle a claim for more than USD 10 million.

Financial institution regulatory agencies – officers and employees of Federal banking agencies, a Federal Reserve Bank or the National Credit Union Administration who have, for at least two months of the last 12 months of employment, served as the senior examiner with continuing broad responsibility for the examination of a specific depository institution or depository institution holding company (“examined entity”), are prohibited for one year following termination of employment with the regulatory body from accepting compensation as an employee, officer, director or consultant from the examined entity, or any other holding company or other company that controls or is controlled by the examined entity.

1.3. Time limits

Post-public employment prohibitions and restrictions are considered as temporary solutions - OECD countries generally use time limits for their application that range from six months (in Norway) to a maximum of a five-year period (in France and Germany). However, countries with general rules on protecting official insider information do not make use of any time limit (e.g. in Austria, Belgium, Denmark, Luxembourg and Sweden).

Figure 7. Countries applying time limits



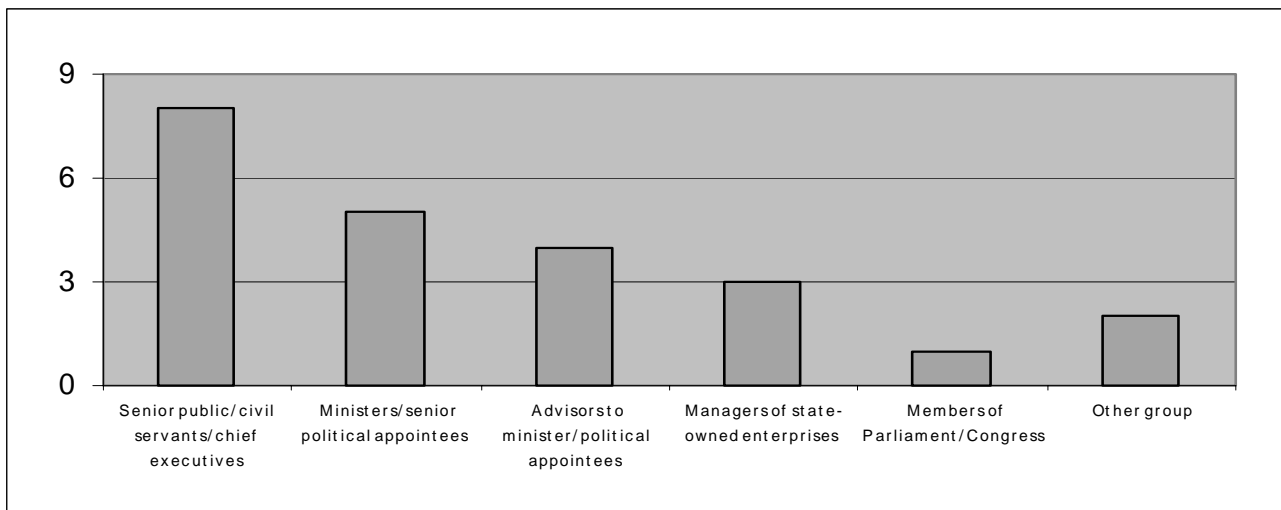
Countries fix the **general time limit** at one year (e.g. Canada, Ireland, Poland and Slovakia) or two years (e.g. Japan, Korea, The Netherlands, Turkey and the United Kingdom). The five year “cooling-off period” as maximum can be applied for civil servants if they leave the service before they reach their retirement age (65 year) in Germany. However, this time limit is up to three years in the case of retiring civil servants and during the period when they receive a transitional allowance (usually two years but maximum three years) for fixed-term volunteer soldiers. When public officials definitively leave the public service in France, for a period of five years they cannot:

- Exercise private activities that are determined by the administration; and
- Financially participate in private enterprises that have a relationship with the former employer.

In some cases **no fixed time limit** applied because the actual duration of the limitations depends on the life of a specific matter in which the official has personally and substantially participated [e.g. post-employment restrictions defined by 18 U.S.C. 207(a)(1) for all executive branch officials].

The **same time limits** are applied to all public officials in half of the responding countries, whereas some countries set different time frames depending on seniority (e.g. one year time limit at the Federal Public Service and two years for public office holders in Canada; one year period for senior civil servants in Ireland).

Figure 8. Public officials with specific time limits on post-public employment



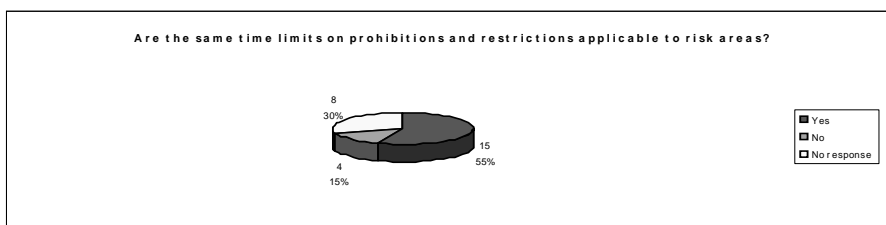
Box 4. One year “cooling off” period for executives in the Canadian Public Service

For a period of one year after leaving their office, public servants in executive positions cannot:

- Accept an appointment to a board of directors of, or employment with, entities with which they personally, or through their subordinates, had significant official dealings during the period of one year immediately prior to the termination of their service.
- Make representation for, or on behalf of, persons to any department or organisation with which they personally, or through their subordinates, had significant official dealings during the period of one year immediately prior to the termination of their service.
- Give advice to their clients using information that is not available to the public concerning the programmes or policies of the departments or organisations with which they were employed or with which they had a direct and substantial relationship.

Few countries developed **specific prohibitions and time limits for risk areas**: approximately three quarters of responding countries use the same rules on prohibitions and restrictions at risk areas and more than four fifths of countries apply the same time limits.

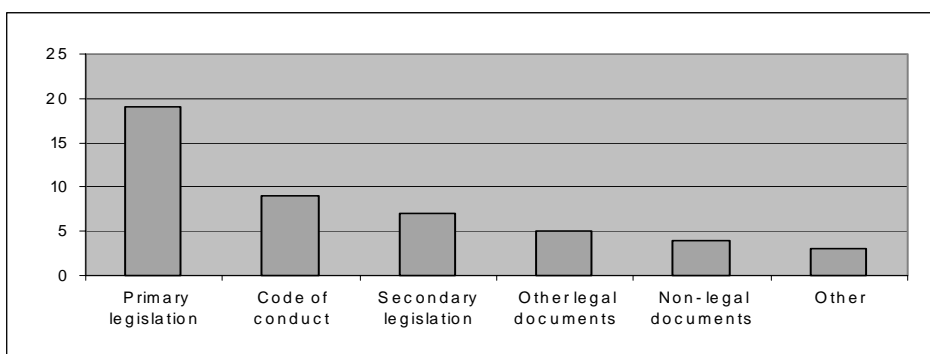
Figure 9. Application of specific time limits in risk areas



1.4. Formal sources of prohibitions and restrictions

Prohibitions and restrictions for post-public employment are mostly embedded in laws as the following figure indicate:

Figure 10. Formal source of prohibitions and restrictions



The principal source of prohibitions is **primary legislation**, including:

- General laws on civil/public service and public administration – e.g. the General Statute of Officials in Belgium and France, the Acts on Federal Civil Servants in Austria and Germany, the Act on Civil Service in Slovakia, the National Public Service Law in Japan and the Public Administration Act in Denmark.

- Laws on specific groups of public officials – e.g. Act on the Legal Status of Soldiers in Germany and Act on Judges in Austria – and electoral codes – such as in France and Ireland.
- Criminal codes – e.g. in Denmark and the United States.

Some countries enacted acts specifically aimed at setting ethical standards that also include provisions on post-public employment, such as:

- The Law on Prohibitions of Post-Public Employment (Law No: 2531) in Turkey.
- Limitation on Conducting Business Activity by Persons Performing Public Functions Act, 21 August 1997 in Poland.
- The Ethics in Public Office Act, 1995 and the Standards in Public Office Act, 2001 in Ireland.
- Law on Incompatibilities of High-ranking Public Officials, Law 12/1995, 11 May in Spain.

Secondary legislation is often used in countries with administrative law tradition to support implementation by providing further specificities. These rules are issued by the central organisation in charge of the overall implementation (e.g. the Ordinance of the Federal Ministry of Defence of 2 September 2002 in Germany and the Rules of National Personnel Authority in Japan). In Canada separate codes were developed for the public service and public office holders:

- For the most senior officials, the Conflict of Interest and Post-employment Code for Public Office Holders includes post-employment compliance measures in Part III.
- The revised Values and Ethics Code for the Public Service (came into force on 1 September 2003) is an employer policy and contains the post-employment measures for the public service in Canada.

Several countries include post-employment provisions in **code of conduct** or code of ethics, such as the Code of Ethics issued by the Civil Service Office in Slovakia, the Bylaw on Codes of Ethics for Public Servants in Turkey, the Code of Good Government in Spain, the Civil Service Code of Standards and Behaviour in Ireland (Section 20-21) and the Code of Conduct for the executive branch also has a section on “seeking” government employment which is administratively enforced in the United States.

Legal instruments are predominantly used to set rules for post-public employment, only very few countries make use of **non-legal instruments**, such as guidelines (e.g. Guidelines set out by the Prime Minister’s Office in Denmark) and summary of post-employment restrictions provided by the US Office of Government Ethics. In Australia, the principal source of guidance for agencies about post-separation employment, and conduct issues generally, is the APS Values and Code of Conduct in Practice: A Guide to Official Conduct for APS Employees and Agency Heads¹⁰.

Countries are often confronted with the **limitation** of using general laws on public/civil service or codes to impose sanctions on former public officials in the case of breaching post-employment standards. This limitation by the scope of the Public Administration Act in Norway led to the solution to include the post-employment rules in the contract of public servants and politicians by the new Guidelines approved in 2005. A second aspect of limitation is related to the standards and practice at the sub-national level. The

¹⁰ Chapter 12 of the Guide deals with post-separation employment. This Guide was released in 2003 to update and replace the former Guidelines on Official Conduct of Commonwealth Public Servants (1995). A second edition was issued in 2005.

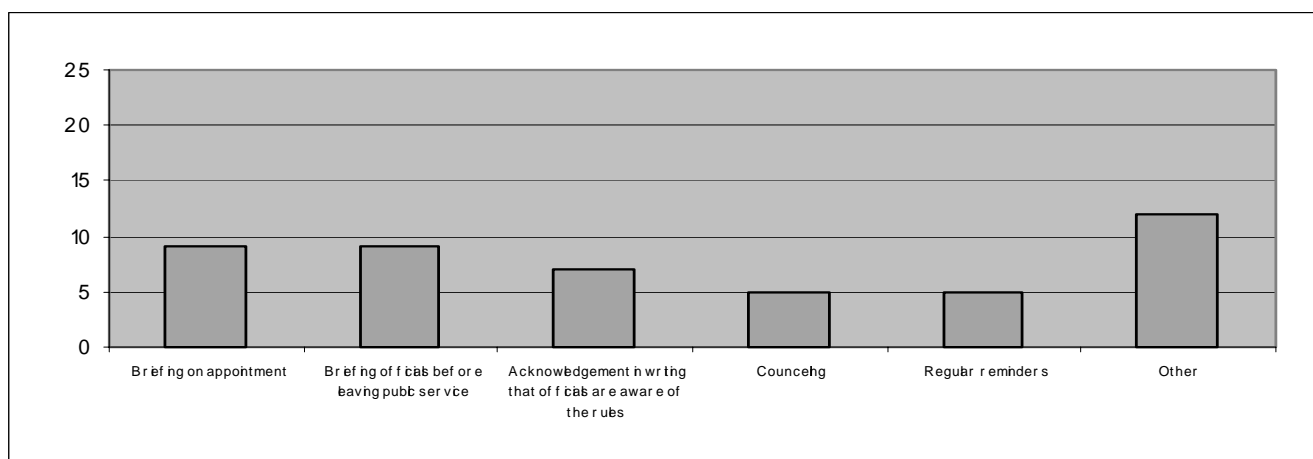
rules outlined in this paper focus exclusively on public officials working at the central level¹¹ although conflict-of-interest situations after leaving public employment could similarly endanger trust in public decision making at the sub-national level.

2. Arrangements for implementation

2.1. Making officials aware of prohibitions

Communication of rules on post-employment prohibitions and restrictions is crucial to make officials aware of expected standards. Consequently, a majority of countries does not employ a single instrument but a combination of measures for communication. Managers play a key role in the process. For example, in the Australian Public Service it is the responsibility of Agency Heads to ensure that measures to manage conflicts of interest are applied effectively in their agencies. This means that employees need to be made aware of their responsibilities to disclose and take reasonable steps to avoid conflicts of interest, and that procedures are in place to deal with situations where it appears that individuals have not met their responsibilities.

Figure 11. How officials become aware of prohibitions and restrictions



Briefing – both on appointment and on leaving – is the most frequently used measure. All new staff receives the Civil Service Code of Standards and Behaviour at a briefing on appointment in Ireland. In the Canadian Public Service a copy of the Values and Ethics Code for the Public Service is attached to the letter of offer for all new and subsequent appointments. Departments were recently reminded of the responsibility of Deputy Heads to ensure that a public servant who is intending to leave the public service is aware of the post-employment measures. A draft post-employment letter was also sent to departments and posted on the website¹². In Spain the Directorate General of Public Administration sends a reminder to the high-level officials when joining or leaving their office.

Counselling is generally provided by personnel departments and managers (e.g. in Ireland and Germany) or dedicated agency ethics officials in the United States and the Special Investigations Section in the Federal Ministry of Defence in Germany. In Mexico the Ministry of Public Administration (through its

¹¹ Certain rules and policies are also applied at the sub-national level, e.g. in Spain the autonomous communities approved specific norms on post-employment almost identical to the Law 12 /1995 on incompatibilities.

¹² Web site of the Office of Public Service Values and Ethics in Canada: http://www.hrma-agrh.gc.ca/veo-bve/index_e.asp.

Legal Affairs Unit) disseminate the standards for interpreting and applying the laws and also provides advice for federal public officials. In addition, the Ministry organises (through its Office of Public Service Rules and Regulations) a variety of courses on public officials' responsibilities. Consultation of the relevant Ethics Commission is obligatory for officials leaving the public service in France in order to get its opinion. Post employment rules are a consistent part of annual training in the United States. Training and civil service examinations are also used to raise awareness of post-employment measures in Austria and Luxembourg.

Former public officials may also need advice to meet obligations. In Canada the Ethics Commissioner provides advice on proposed employment as well as reduction/waiver of certain restrictions for former public office holders. In Ireland, Officers below Assistant Secretary level must apply to the Secretary General or Head of Office in which they last served before retirement or resignation, whereas officers at and above Assistant Secretary level must apply to the Outside Appointments Board.

The communication of rules also targets the **private sector** in a few countries. In Australia, for example, 77% of the Australian Public Service (APS) agencies reported defining and communicating agency's expectations to non-public servants to comply with the relevant APS Values and Code of Conduct¹³. Of these:

- 75% did so through information set out in tender documentation.
- 78% reported using general clauses in contracts referring to the APS Values and Code of Conduct.
- 25% reported including specific contractual clauses regarding only relevant aspects of the Values and Code.
- 22% of relevant agencies reported using non-contractual arrangements such as briefing sessions, protocols and training.

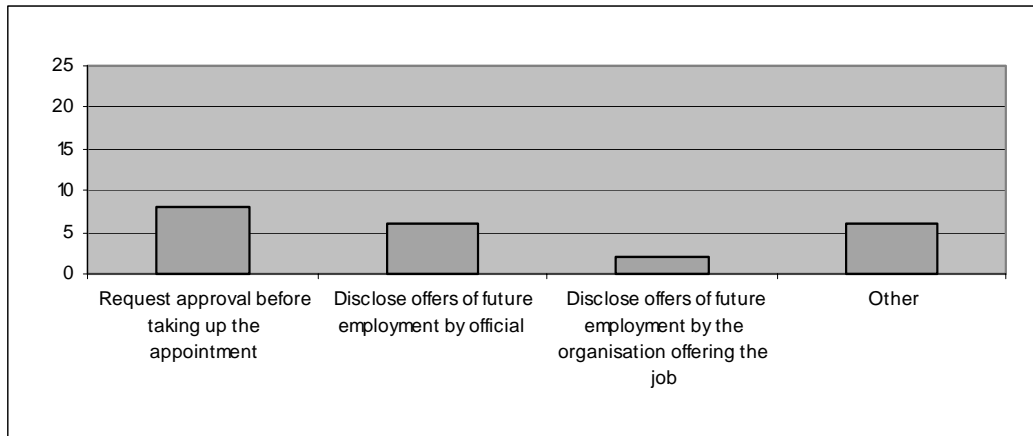
2.2. *Application of prohibitions and restrictions: Procedures for decisions*

Providing information

Obligations without proper application remain words on paper. Countries paid much less attention to establishing procedures for adequate application of prohibitions and restrictions. The most common are requesting approval and disclosure of future employment. However, as the following figure indicates, these are used only in a minority of OECD countries.

¹³ State of the Service Report 2003–04.

Figure 12. Procedures used for deciding on specific post-public employment cases



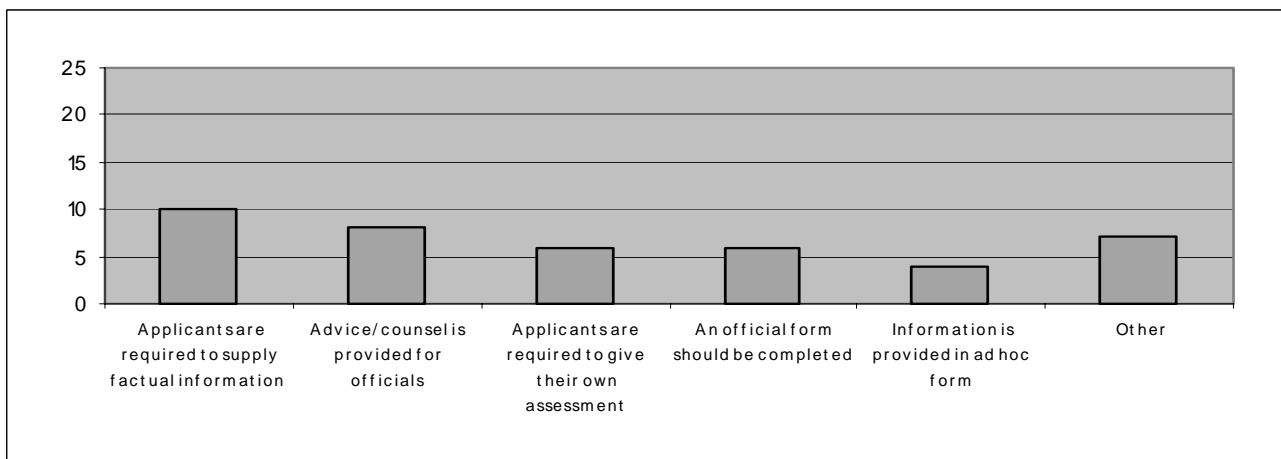
High-ranking officials leaving the public service are obliged to notify the Directorate General of Public Administration in Spain by providing all relevant information on future activities in the private sector.

Box 5. Providing information on post-employment in the United States

Although there is no legal requirement for executive branch officials to report their seeking or negotiations for a non-government position, the criminal provisions on negotiating for future employment require the individual to recuse from matters that have a direct and predictable effect on the prospective employer. Recusal often necessitates an explanation so that others understand why the individual cannot continue to work on particular matters.

Those individuals who are required to file “public financial disclosures” must report any arrangements with future employers on their financial disclosure forms. These arrangements must be disclosed in the disclosure form to the extent an arrangement exists at the time the report is required to be filed.

Figure 13. Information gathered for decision on post-public employment

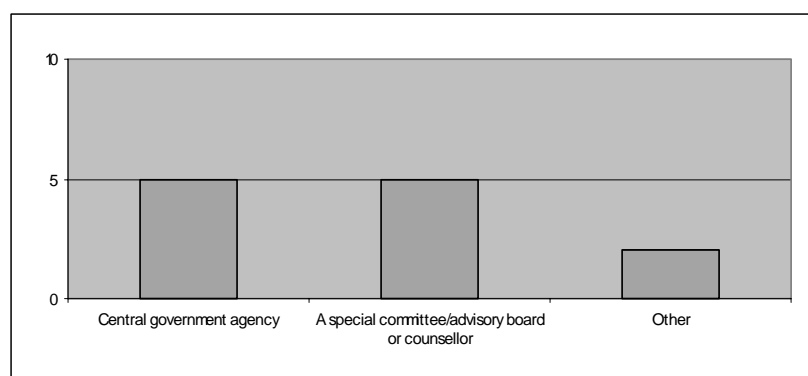


Consultation

A minority of countries requires **consultation** before taking the decision on a concrete post-employment case. As the following figure indicates, these organisations involved in the consultation process are mainly:

- Central government departments and agencies, such as the Office of Public Service Values and Ethics in Canada, the relevant sections in Germany, secretary general of department in Ireland and the Legal Affairs Unit in the Ministry of Public Administration in Mexico.
- Independent committees – the relevant Ethics Commissions in France, Government Ethics Committee in Korea, Outside Appointments Board in Ireland.

Figure 14. Who is consulted before decision on post-public employment cases?



Box 6. Gathering information for decision: Consultation in Germany

All those sections and departments in which the civil servant or soldier has worked during the five years prior to the end of service are asked whether it may have been possible for the civil servant or soldier to have had an influence on the economic concerns of his/her future employer or contractual partner.

The relevant sections and departments are also asked about the extent of "official knowledge" of the civil servant or soldier concerned.

In Canada, besides the Office of Public Service Values and Ethics, the public servant's manager, departmental values and ethics' senior official and practitioners are also sources for consultation in the public service. Public office holders can consult the Ethics Commissioner.

Making decisions

Making the decision on post-public employment cases is generally the responsibility of:

- Top management of public organisations – secretary general of departments in Ireland, the head of the organisation for civil servants in Norway, the deputy head of public organisations for public servants in Canada.
- An independent body – the Ethics Commissioner for public office holders in Canada, the Outside Appointments Board in the case of assistant secretary level and above in Ireland, the Competition Authority in Italy, the Government Ethics Committee in Korea, the Standing Committee on Outside Political Appointments for Politicians in Norway.

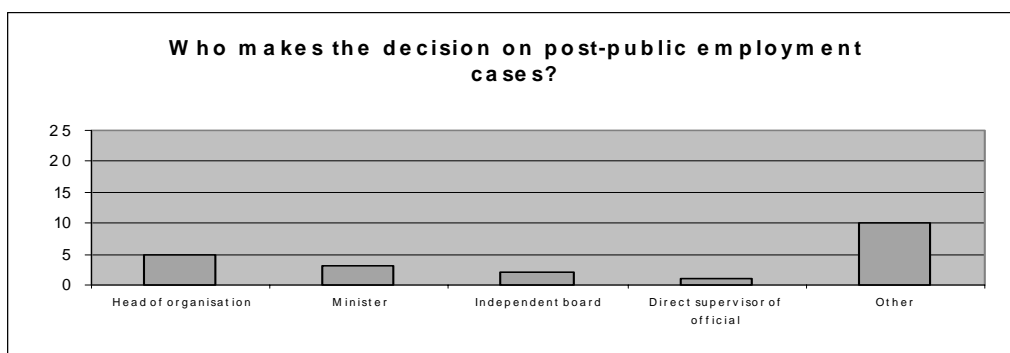
In Canada, the deputy head of each organisation is delegated the authority to make decisions on post-employment. However, they may not delegate their accountability for ensuring that the Code is fully upheld and advanced within their organisation. In Spain the Directorate General of Public Administration centralises decisions on post-employment of high-ranking officials. In Japan, the decision in post-

employment cases is generally delegated to the head of each administrative body. However, the approval of the National Personnel Authority is required in the following cases¹⁴:

- Employees going to assume board members in companies.
- The level of the administrative post is equivalent or higher than director.

Within a period of one year after leaving a state managerial position in Poland, the person concerned is 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 applicant.

Figure 15. Making decision on post-public employment cases



In Germany, for example, the personnel departments make decisions on application of rules in post-employment cases and the Special Investigations Section in the Federal Ministry of Defence examines non-compliance. Breach of obligations may be investigated by internal control units in Mexico, they can also sanction non-compliance. In the United States, the Department of Justice makes the decisions on whether to prosecute.

Box 7. Procedure for decisions in Spain

In the preparation of the new Bill on conflict of interest¹⁵, the following process was agreed to prepare decisions in post-public employment cases:

- Former high-ranking officials should inform the Office of Conflict of Interest before undertaking any future employment activity.
- The Office will analyse the situation and will consider whether or not the activity violates the law.
- The Office will communicate its opinion to the interested party.
- The interested party is allowed to reply.
- Finally, the Office will make a decision.

Flexibility

Providing flexibility in the application of general rules in individual cases is an emerging concern in countries. In Japan the head of the employing government agency can apply for an **exception** to the post-

¹⁴ The National Personnel Authority approved 89 cases while 630 cases were approved by the administrative bodies in 2004.

¹⁵ Further information on the Bill can be obtained in *Modernising conflict of interest legislation: The Spanish experience* GOV/PGC/ETH(2006)2.

employment restrictions¹⁶ to the National Personnel Authority, and needs its approval for making an exception to the rules. Members of government and high-ranking officials in Spain will not breach incompatibility regulation when they return to the private company in which they worked before being appointed as long as the activity they are going to carry out in the private sector is not directly related to the competences of their previous office, or where they cannot take decisions related to that office.

Applying flexibility in concrete cases may require **standards** to ensure fairness in the process and accountability of decisions. However, a few (six responding) countries indicated that they have developed standards against which post-public employment decisions can be made. Some countries include them in legal provisions (e.g. France and Mexico). In the United States both the restrictions and the standards for the exceptions and issuing the waiver are also set forth in statute¹⁷. Ireland indicated the establishment of guidelines to provide standards in the future.

Box 8. Factors for reducing the time limits in Canada

In Canada every case is reviewed on a case-by-case basis to determine if there is a real, apparent or potential conflict of interest between the new employment of former public servants and their most recent responsibilities within the federal public service. The Values and Ethics Code for the Public Service outlines the restrictions as well as six circumstances under which the one year limitation period could be reduced or waived. The deputy head can waive or reduce the limitation period for a public servant or former public servant taking into consideration the following factors:

- a. The circumstances under which the termination of their service occurred.
- b. The general employment prospects of the public servant or former public servant.
- c. The significance to the government of information possessed by the public servant or former public servant by virtue of that individual's position in the public service.
- d. The desirability of a rapid transfer of the public servant's or former public servant's knowledge and skills from the government to private, other governmental or non-governmental sectors.
- e. The degree to which the new employer might gain unfair commercial or private advantage by hiring the public servant or former public servant; and
- f. The authority and influence possessed while in the public service, and the disposition of other cases.

Appeal

Decisions on post-public employment are open to appeal in eleven responding countries. In these cases, decisions can be appealed in general to:

- An independent court or tribunal (e.g. in Germany, Ireland, Italy, Japan, Portugal, Turkey).
- An administrative body within the public service (e.g. in Germany, Ireland, Portugal).

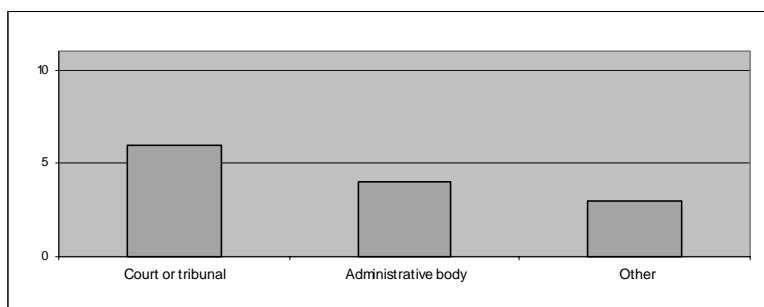
Secretary Generals' decisions may be appealed to the Outside Appointments Board in Ireland. The decisions on post-public employment cases are taken by the Competition Authority in Italy and can be appealed to the administrative courts, with two levels of judgement. In the United States, advice is not open to any formal appeal, although in very large agencies there may be an informal appeal to a centralised ethics office regarding the advice of a regional ethics officer. An individual who objects to advice that a

¹⁶ The National Public Service Law stipulates that personnel are prohibited for a period of two years after leaving the service from accepting or serving in a position in a profit-making enterprise which has a close connection with the agency in which they were formerly employed within five years prior to separation from the service, and the agency which is under the restriction are defined by the rules of the National Personnel Authority.

¹⁷ 18U.S.C.207(j) and (k).

statute may prohibit his or her planned future conduct could seek a declaratory judgement to the contrary through the courts, or decide to engage in the conduct and defend his/her conduct during any subsequent prosecution. If convicted, the individual may appeal the conviction to the next level federal court.

Figure 16. Forums to appeal a post-public employment decision



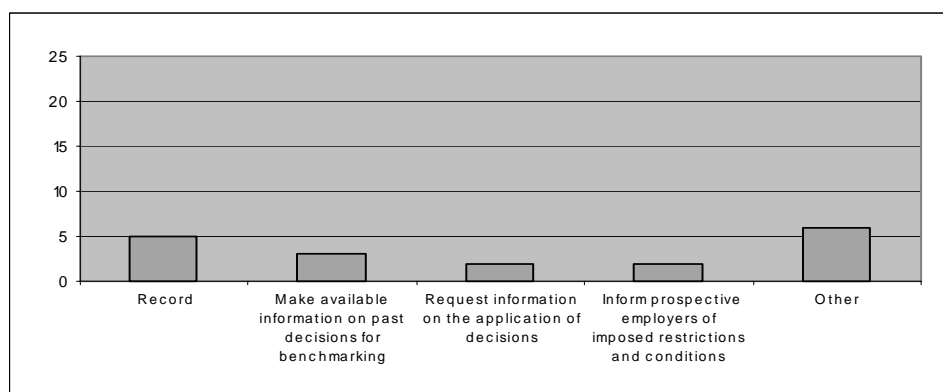
Although no formal appeal procedure exists in some countries, civil servants can ask for a new decision from the head of an organisation, whereas politicians can turn to the Standing Committee on Outside Political Appointments for Politicians in Norway¹⁸ and also ask for a meeting to discuss the case. Public servants or former public servants in Canada may apply to the deputy head for reconsideration of any decision regarding their compliance with the post-employment measures.

Supporting application

Support measures are used fairly exceptionally to ensure implementation of decisions. Relatively commonly employed measures facilitate communication of decisions and reporting on practice, as the following examples show in Norway and Ireland:

- The Secretariat for the Standing Committee on Outside Political Appointments provided by the Ministry of Government Administration and Reform file the cases and made decisions available on the Web site. The implementation of decisions regarding former civil servants remains their own responsibility, and no system exists for reporting these decisions. However, the Ministry might consider assessing this system after collecting more information on implementation.
- The Chairman of the Outside Appointments Board in Ireland reports annually to the Government, through the Minister for Finance, on the performance of the Board and may also submit additional ad hoc reports on the Board's functions.

¹⁸ "Designing and implementing post-public employment regulations for civil servants and politicians: The Norwegian initiative", GOV/PGC/ETH(2006)4.

Figure 17. Measures used to ensure implementation of decisions

Informing prospective employers of imposed restrictions and conditions is very rarely used. However, in Canada a large procurement department has taken steps in this direction.

Box 9. Measures supporting implementation in the United States

Advice given may be kept in written form, depending upon the agency's practice, or at the request of the individual requestor. Depending upon practice, the agency may issue general educational or training materials using sanitised versions of real situations. Current employees who are aware of the post employment restrictions may also be sensitive to any contacts they may have with a former official and may seek advice with regard to those contacts, particularly if they believe the contacts may violate the post employment statute. A public official sensitive to post employment restrictions can both avoid misconduct of their own when leaving government service as well as identify potential misconduct of others.

Each year, the Office of Government Ethics compiles a description of all of the prosecutions of the criminal conflict-of-interest statutes, including 18 U.S.C. 207 and makes that description available on its Web site¹⁹. The compilation includes the name of the individual convicted, a short description of the conduct, and any sentence imposed.

Specific prospective employers may request information from the ethics official on the application of the statutes, and general information is provided to the private sector through various training/seminar venues that focus on Government ethics and the private sector. Additionally, OGE maintains a digest of its informal opinions on the OGE Web site²⁰, many of which address post employment restrictions.

2.3. Enforcement and sanctions

Providing dissuasive sanctions is a key element for enforcing post-public employment prohibitions and restrictions, however timely application of sanctions is also needed to discourage potential breaches of obligations. Countries developed a **combination of sanctions** for non-compliance that is based on traditional sanctions, including:

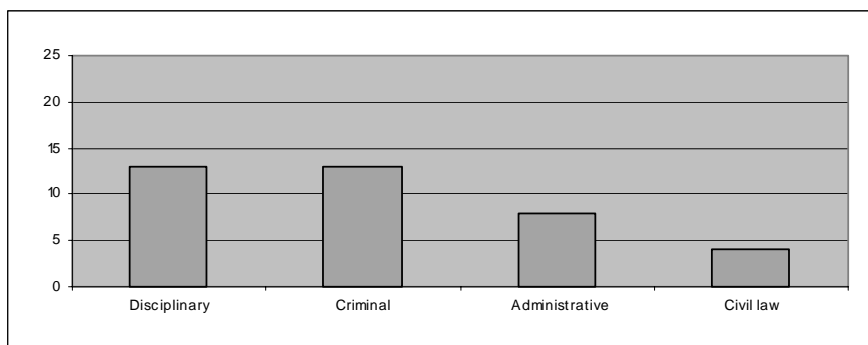
- Disciplinary sanctions – for example ranging from reprimand to dismissal for a violation of the provisions for seeking employment of the standards of conduct in the United States. Curtailment of the affected civil servant's or soldier's retirement pension is possible in Germany.

¹⁹ The Conflict of Interest Prosecution Surveys from 1990 to 2004 can be consulted at http://www.usoge.gov/pages/laws_regs_fedreg_stats/other_ethics_guidance.html.

²⁰ http://www.usoge.gov/pages/advisory_opinions/advisory_opins.html.

- Penal sanctions – for example one year imprisonment in Korea; and in the United States up to five years imprisonment and a fine of not more than USD 250,000 or a multiplier of the gain or loss whichever is greater.

Figure 18. Sanctions for breaching the rules



Few countries apply administrative sanctions for the former officials (in Norway can get a penalty for default can be imposed) or the private company improperly employing a former official. In the latter case, the non-compliance with the law is published in the Official Gazette of the State in Spain. It implies debarment from public contracts, automatic exclusion of the company during the period of the time limit of prohibitions for the former high-level official. In addition, the declaration of very serious or serious violation of the post-employment rules in the Official Gazette prevents the person concerned from occupying public office for five or ten years. As an additional civil law sanction, former officials may also risk having their public service pension reduced.

Box 10. System of sanctions in Italy

The Competition Authority in Italy exercises ex-post control of new employment. After the appointment has been made, the Competition Authority checks their compatibility with the law. If the appointment is judged 'incompatible' or non-compliant, the following sanctions can be applied:

- 1) Removal or disqualification from office or position – by the competent administration or by that responsible for supervising the entity or undertaking.
- 2) Suspension of the public or private employment relationship.
- 3) Suspension of registration in professional rolls and registers, for which a request must be addressed to the professional organisations for the actions within their competence.

The seriousness of sanctions may also depend on the **circumstances** of how the post-employment obligations were breached. Seniority is one factor that is used in a few responding countries. In Mexico, for example the following elements are considered in the imposition of administrative sanctions in addition to the violator's rank and history, including seniority in the service²¹:

- The seriousness of the responsibility incurred and the advisability of eliminating practices that in any way violate the provisions of the law or those that are enacted based on it.
- The public official's socio-economic circumstances.
- The exterior conditions and the means of execution.
- Repeated breaching of obligations, and

²¹ Article 14 of the Federal Law on Public Officials' Administrative Responsibilities.

- The amount of the benefit, gain or damage derived from the breaching of obligations.

3. Reviewing and updating prohibitions and their implementation

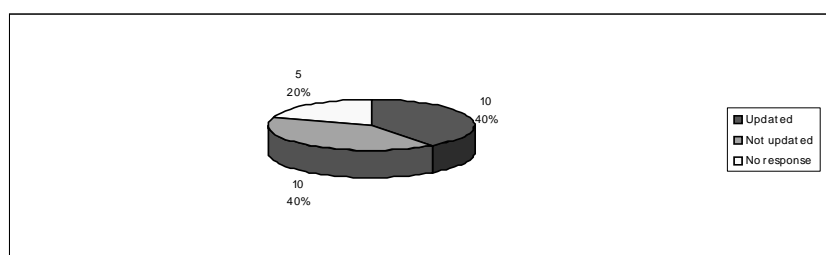
Reviews and updates

Post-employment rules and their implementation have been **reviewed** in several countries in the past five years. A recent review in Luxembourg showed that the existing rules on professional secrecy were effective and did not require modification in the 2003 revision of the Statute. The Defence Committee of the German Bundestag requested the Federal Government to carry out a review of relevant rules. The Committee concluded that the legal requirements for post-employment were still necessary, although there was no need to amend the relevant legislation and merely suggested changing the corresponding Ordinance that was amended on 2 September 2002.

On the other hand, relevant rules, policies and practices have been updated in half of the responding countries in the past five years. For instance, the following countries **modernised** or **established** post-employment rules in their primary or secondary legislation:

- In Canada the Values and Ethics Code for the Public Service was implemented and it replaced the previous Conflict of Interest and Post Employment Code for the Public Service in September 2003. The Conflict of Interest and Post-employment Code for Public Office Holders was also updated in December 2003 and again in October 2004.
- In Ireland the Civil Service Code of Standards and Behaviour was introduced in 2004.
- In Italy the Law 215/2004 on conflict of interest was enacted in January 2005.
- In Korea the blind-trust stock for high-ranking officials was established in 2005.
- In Mexico the new Federal Law on Public Officials' Administrative Responsibilities was published in the Federal Official Gazette on 13 March 2002.

Figure 19. Rules, policies and practices were updated in the last 5 years



Furthermore, there are still **ongoing efforts** to modernise post-employment rules in a few countries, for example:

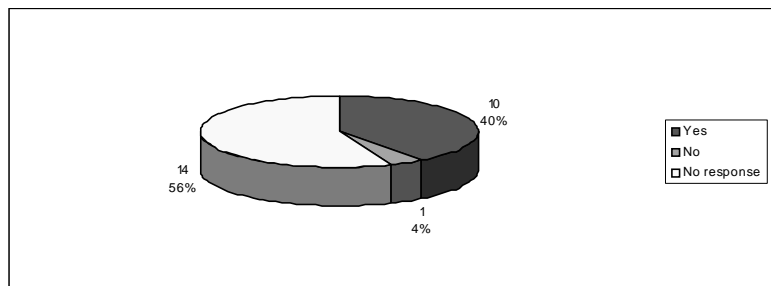
- A Bill on conflict of interest is before the Parliament to introduce a stricter regime in Spain; and
- A draft law is under consideration to give further power to the Ethics Commissions to impose sanctions for non-compliance in France.

Achieving objectives and remaining challenges

Responses to the survey indicated that prohibitions and restriction were generally considered as achieving their objectives in OECD countries. However, it is worth underlining that the majority of

countries did not provide a response to this question and several countries acknowledged that they have been struggling with specific problems.

Figure 20. Have prohibitions and restrictions achieved their objectives?



A **key challenge** is the application of **sanctions** for breach of the post-employment rules. In many countries there are no sanctions available. In Canada, for example, the current post-employment compliance measures are generally considered as sound and appropriate. However, the Conflict of Interest and Post-employment Code for Public Office Holders provides no sanction in the event of violation of post-employment compliance measures of the Code and any sanctions for post-employment breach would require legislation in Canada. Concerning public servants, the main challenge is the lack of control to impose sanctions for former public servants who breach the Values and Ethics Code for the Public Service in Canada. Sanctions are not specified in the laws in Turkey.

The **scope** of existing legislation -- limited to public officials in office -- also presents challenges for enforcement of provisions. The post employment provisions defined by the Act on Civil Service, for example in Slovakia, are not applicable to civil servants who have already left their positions. Solution to this problem would require a more complex regulation of sanctions. In Germany, the application of the Amended Ordinance of 2 September 2002 to salaried employees poses a challenge because their contracts are not subject to collective agreements and require relevant contractual arrangements.

Empowering **control mechanisms** to foster compliance is a key concern in France, although statistics provided by the three Ethics Commissions reveal certain stability in the number of cases in the last two decades. Consequently, strengthening control procedures as well as broadening and completing the sanctions available for control organisations consists of a central element in the draft law under preparation. Current sanctions were considered insufficiently severe in Spain; consequently the Bill on Conflict of Interest establishes a new sanction regime.

The introduction of strict sanctions by primary legislation, together with the preventive measures – in particular the inquiries and communication – significantly contributed to the substantial decrease of relevant disciplinary and criminal cases in the last five years in Mexico. However, this achievement needs to be consolidated, particularly at the sub-national level. Supporting regional and local governments in developing and implementing sound conflict-of-interest policy for post employment remains wishful thinking without shared understanding and commitment for action. The “co-ordination agreements” signed with governors of states in Mexico may provide a basis for such co-operation.

Box 11. Prevention and enforcement by counselling and oversight in the United States

Employee surveys organised by the US Office of Government Ethics have indicated that providing counselling for all types of questions including post employment questions is more effective than simple training and education programmes.

The oversight by the private sector of the private sector and the former government employees who have been hired – as disappointed bidders have the right to challenge government contracts and the issuance of other government benefits if they believe that a conflict of interest has occurred during the process – may serve to support effective enforcement of post-employment provisions. In addition, Government employees themselves provide effective oversight for enforcing post employment restrictions by reporting to their ethics officials or Office of Inspector General improper contacts made by former employees.

Identifying and preventing conflicts of interest in post employment becomes more challenging as the public sector develops closer relationship with the private sector. More frequent interchange of personnel between sectors makes it more crucial that standards reflect public expectations and that existing mechanisms enable their application in all situations. Post-public employment could become a particularly highly sensitive issue during government transitions or periods of outsourcing and downsizing.

4. Summary of preliminary findings

- The findings of the survey demonstrated that governments have been **aware of the potential danger** of post-public employment; their primary concern is when “insider information” is misused by former officials.
- Consequently, the vast majority of OECD countries set out prohibitions and restrictions for post-public employment in order to avoid conflict of interest. These **post-public employment rules** have been maintained; several countries even strengthened prohibitions and reinforced their implementation to achieve compliance in the last five years
- The findings also indicate that countries use more the approach of setting **general prohibitions and restrictions** for post-public employment that are applicable across the whole public service and less tailored to risk areas. A few countries have developed specific standards that focus on the most senior level of officials, including policy makers and top civil/public servants. Paying adequate attention to risk areas at the public/private sector interface is a key factor for successfully avoiding conflict of interest in post-public employment, in particular as horizontal movement between the two sectors has been encouraged in many countries.
- The responses to the OECD survey also show that although the vast majority of OECD countries set general prohibitions and restrictions for post-public employment, countries established much fewer mechanisms to put these rules into practice. **Enforcing restrictions and imposing suitable sanctions** in the case of breaching obligations in particular remain a challenge for many countries.

Questions for discussion

- *What objectives could justify the introduction and/or maintenance of prohibitions and restrictions for post-public employment?*
- *What standards are necessary to achieve these objectives? How could general prohibitions be better tailored to risk areas?*
- *How to achieve compliance? What measures could successfully support implementation and what sanctions proved effective?*