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Addendum

Deuxième Cycle d'Evaluation

Addendum au Rapport de Conformité sur la Finlande

Adopté par le GRECO
lors de sa 38^{ème} Réunion Plénière
(Strasbourg, 9-13 juin 2008)

I. INTRODUCTION

1. Le GRECO a adopté le Rapport d'Evaluation du Deuxième Cycle sur la Finlande lors de sa 19^{ème} réunion plénière (28 juin-2 juillet 2004). Ce rapport (Greco Eval II Rep (2003) 3F), qui contient quatre recommandations à l'intention de la Finlande, a été rendu public le 6 juillet 2004.
2. La Finlande a soumis le Rapport de Situation, requis par la procédure de conformité du GRECO, le 27 décembre 2005. Sur la base de ce rapport, et après débat, le GRECO a adopté le Rapport de Conformité du Deuxième Cycle (rapport RC) sur la Finlande lors de sa 29^{ème} réunion plénière (19-23 juin 2006). Ce dernier rapport a été rendu public le 23 juin 2006. Le Rapport de Conformité (Greco RC-II (2006) 2F) a conclu que les recommandations i, ii et iv ont été mises en œuvre de façon satisfaisante et que la recommandation iii a été partiellement mise en œuvre ; le GRECO a demandé des informations complémentaires sur la mise en œuvre de cette dernière recommandation. Ces informations ont été fournies le 15 janvier 2008.
3. Le présent Addendum au Rapport de Conformité du Deuxième Cycle a pour objet d'évaluer la mise en œuvre de la recommandation iii à la lumière des informations complémentaires visées au paragraphe 2.

II. ANALYSE

Recommandation iii.

4. *Le GRECO a recommandé d'introduire des règles ou des directives claires régissant les transferts des agents publics vers le secteur privé (« pantouflage »), afin d'éviter les conflits d'intérêt.*
5. Le GRECO rappelle que, dans le Rapport de Conformité, cette recommandation était considérée comme partiellement mise en œuvre dans la mesure où les règles interdisant aux fonctionnaires quittant un poste de l'Administration de divulguer des informations confidentielles ne couvrent pas suffisamment les problèmes éthiques qui peuvent se poser lorsque des fonctionnaires – qu'ils divulguent ou non des informations confidentielles – intègrent une entité privée similaire, apparentée ou concurrente, directement ou peu après avoir quitté le service public.
6. Les autorités finlandaises ont maintenant soumis les « Lignes directrices concernant le passage de fonctionnaires au service d'autres employeurs », document émis par le Ministère des Finances le 16 novembre 2007 (voir annexe). Le texte comprend une partie générale expliquant que ces Lignes directrices s'appliquent à tous les fonctionnaires mais visent principalement ceux « *qui, dans l'exercice de leurs fonctions, ont connaissance d'informations particulièrement sensibles du point de vue des intérêts des entreprises ou de l'Administration. Il s'agit en particulier des situations dans lesquelles un fonctionnaire se voit confronté à la possibilité de tirer profit d'informations qu'il a reçues durant son service et qui concernent des entreprises concurrentes* ». La deuxième partie des Lignes directrices, intitulée « Réglementation en vigueur », renvoie aux textes de lois pertinents : la loi sur les fonctionnaires (750/1994), la loi sur la transparence de l'action des pouvoirs publics (621/1999), les dispositions du Code pénal concernant les infractions de corruption, les infractions commerciales, l'espionnage et les infractions commises dans l'exercice de fonctions (chapitres 16, 30 et 40), ainsi que la loi sur les pratiques commerciales déloyales (1061/1978). La troisième partie des lignes directrices traite des conditions d'emploi contractuelles dans le secteur public. Dans cette partie, un ensemble de règles et d'extraits de la loi sur les fonctionnaires (article 44) explique comment traiter les

situations dans lesquelles un fonctionnaire disposant d'informations particulièrement sensibles quitte ses fonctions pour intégrer un poste dans lequel les connaissances et l'expertise qu'il a acquises ne sont généralement pas accessibles.

7. Le GRECO prend note de cette information complémentaire. Il estime que le document soumis offre un aperçu de la situation juridique actuelle et qu'il comporte en outre un certain nombre de directives utiles, à l'intention des employeurs ainsi que des employés, concernant les mesures à prendre lors de la démission de fonctionnaires de l'administration centrale chargés d'affaires particulièrement sensibles pour les intérêts des entreprises ou de l'Etat. Les directives prévoient notamment que, dans de telles situations, le fonctionnaire démissionnaire doit immédiatement (dès la remise de sa démission) quitter les fonctions concernées, et peut faire l'objet d'une « mise en quarantaine » durant laquelle il n'est pas autorisé à se mettre au service d'un autre employeur. En revanche, l'employé a le droit de continuer à percevoir son salaire durant la période de « non-disponibilité », qui peut durer jusqu'à un an et doit faire l'objet d'un contrat établi spécifiquement pour cette période. Globalement, le document soumis n'est qu'un résumé de la situation juridique telle qu'elle se présentait lors de l'adoption du Rapport d'Evaluation ; l'EEG se félicite néanmoins que les Lignes directrices figurant dans le document permettent de mieux gérer les conflits d'intérêts qui peuvent apparaître lorsqu'un fonctionnaire chargé de fonctions particulières s'apprête à intégrer le secteur privé.
8. Le GRECO conclut que la recommandation iii a été mise en œuvre de façon satisfaisante.

III. CONCLUSION

9. Outre les conclusions contenues dans le Rapport de Conformité du Deuxième Cycle sur la Finlande, et compte tenu de ce qui précède, le GRECO conclut que la recommandation iii a été mise en œuvre de façon satisfaisante. Les autorités ont donc respecté l'ensemble des recommandations adressées à la Finlande dans le cadre du Deuxième Cycle d'Evaluation. Le GRECO se félicite que la Finlande ait trouvé une solution pour traiter les conflits d'intérêts qui apparaissent lorsque des fonctionnaires intègrent le secteur privé, situation qui semble poser problème à plusieurs Etats membres.
10. L'adoption du présent Addendum au Rapport de Conformité met fin à la procédure de conformité du Deuxième Cycle d'Evaluation sur la Finlande.
11. Le GRECO invite les autorités de la Finlande à traduire l'Addendum dans la langue nationale et à rendre cette traduction publique.



Annexe (anglais uniquement)

MINISTRY OF FINANCE	<input type="checkbox"/> DIRECTIVE	16.11.2007
OFFICE OF THE GOVT AS EMPLOYER	<input checked="" type="checkbox"/> GUIDELINES	12/2007

Content matter Transfer of an official to the service of another employer
Regulations on which issue of directive/guidelines is based Government Rules of Procedure, Section 17
Target groups Ministries and government agencies
Period of validity 16.11.2007 – until further notice

GUIDELINES FOR THE TRANSFER OF AN OFFICIAL TO THE SERVICE OF ANOTHER EMPLOYER

1. GENERAL

These guidelines cover the transfer of a government official from public service to the service of another employer, to self-employment, or outside working life. The guidelines are intended primarily for those officials engaged in work involving information of a particularly sensitive nature from the point of view of the interests of business or the government. Particular reference is made to circumstances in which the public official is presented with the opportunity of taking advantage of information about competing businesses acquired during his or her public service. The guidelines, nevertheless, are applicable to all government officials transferring to the service of another employer.

Regulations governing these circumstances have been compiled for the guidelines, which the public official should observe when working under another employer. Government agencies are urged to communicate this information to the group of public officials targeted in the guidelines, namely those engaged in work involving information of a particularly sensitive nature from the point of view of the interests of business or the government.

The guidelines also deal with the application of the relevant public sector employment contract.

2. RELEVANT REGULATIONS

State Civil Servants’ Act (750/1994)

With regard to the public official’s obligation to observe secrecy, Section 17 of the Civil Servants’ Act refers to the Act on the Openness of Government Activities, and other Acts.

Act on the Openness of Government Activities (621/1999)

Chapter 6 of the above Act includes regulations concerning the grounds for the obligation to observe secrecy and to non-disclosure, and the relationship between them, and on the prohibition of use of secret information. Section 22 of the Act contains basic regulations on the grounds for secrecy of documents, and on the content of the obligation of non-disclosure. Section 23 provides for the grounds for duty of non-disclosure, and non-disclosure and prohibition of use.

The duty to observe secrecy includes prohibiting the showing of a secret official document or the giving of a copy. The duty of non-disclosure chiefly concerns the behaviour of public officials. This refers to prohibiting disclosure of information, whether or not the information is stored. Disclosure refers both to active and passive disclosure of information, such as leaving documents where they can be available to outsiders. Information falling within the sphere of non-disclosure may take the form of official documents or may, for example, be transmitted orally. The duty of non-disclosure is therefore wider in scope than the duty to observe secrecy in the handling of official documents. Prohibition of use is related to the duty of non-disclosure. A person bound by the duty of non-disclosure may not make use of secret information for personal benefit or for the benefit of another. Prohibition of use also covers the making use of information to the detriment of another.

The duration of the duty of non-disclosure is provided for in Section 23 Subsection 1 as follows:

“The provision on non-disclosure shall apply also after the service or the performance of the task on behalf of the authority has ceased.”

The above-mentioned prohibition of use is further defined in the government proposal (HE 30/1998) issued for the Act.

“The subsection states that the duty of non-disclosure shall also continue after the employment relationship, duty discharged in a position of trust, performance of assignment, or action on behalf of an authority, has terminated.”

The duty of non-disclosure, therefore, applies beyond the termination of the employment relationship or task, for as long as the information is held to be secret. Similar conditions on duration have not been laid down with regard to prohibition of use.

Prohibition of use is nonetheless so closely bound to the duty of non-disclosure in the role of material contributing factor that it is logical to consider both as being effective for the same duration.

Corruption and bribes, business offences, business espionage, and offences in office (Chapters 16, 30 and 40 of the Penal Code)

The provisions outlined in chapters 16, 30 and 40 of the Penal Code concerning bribery, business offences, business espionage, and offences in office, also have a bearing on the subject. A public official should become acquainted with the relevant points of the Act before commencement of service under a new employer. Particular attention should be paid to regulations in Chapter 30, Sections 5 and 6 of the Penal Code concerning violation of a business secret and misuse of a business secret, and to those in Chapter 40 Section 5 of the Penal Code concerning breach and negligent breach of official secrecy.

Section 5 (Chapter 40 of the Penal Code)

Breach and negligent breach of official secrecy

If a public official deliberately, while in service or thereafter, unlawfully

1) discloses a document or information which under the Act on the Openness of Government Activities (621/1999) or another Act is to be kept secret or not disclosed, or

2) makes use of the document or information referred to in paragraph (1) to the benefit of himself/herself or of another, or to the loss of another

he/she shall be sentenced, unless a more severe penalty for the act has been laid down elsewhere, for breach of official secrecy to a fine or to imprisonment for at most two years. A public official may also be sentenced to dismissal if the offence demonstrates that he/she is manifestly unfit for his/her duties.

If a public official commits the offence referred to in subsection 1 through negligence, and the act, in view of its harmful and damaging effects and the other relevant circumstances, is not of minor significance, he/she shall be sentenced, unless a more severe penalty for the act is provided elsewhere in the law, for negligent breach of official secrecy to a fine or to imprisonment for at most six months.

A public official may not, therefore, use the information referred to above after termination of employment in public service for personal benefit or for the benefit of another. Prohibition of use of this information is not temporally restricted, but effective permanently.

Unfair Business Practices Act (1061/1978)

Section 4 of this Act provides for the unjustifiable acquisition of a business secret and the misuse of information thus acquired, and for prohibition of its disclosure. Protection of business secrecy is temporally unrestricted. Thus, the duration of protection lasts for as long as the protection of business secrecy carries economic significance.

3. PUBLIC SECTOR EMPLOYMENT CONTRACT

A public official handling information of a particularly sensitive nature from the point of view of the interests of business or the government must, immediately after resigning his or her post, transfer to a type of employment which does not deal with such information.

There may be grounds for agreeing a further special period of non-availability following on from the period of notice. Where possible, preparations for its adoption should be already in place at the start of the employment relationship.

The authority may draw up a contract on the terms of employment together with the public official, in accordance with Section 44 of the State Civil Servants' Act, including agreement on the public official's salary during the period of non-availability. For this equivalent salary the public official shall be bound to a separately agreed period of non-availability following the period of notice, during which time he or she may not perform work in the service of another employer. The maximum period of non-availability shall be one year. The salary for the period of non-availability shall be paid to the public official by the authority, and drawn from the authority's appropriations.

The authority shall consider the merits of individual cases as to whether the drawing up of this type of contract is appropriate.

The drawing up of this type of contract on the part of the public officials referred to in Section 26 of the State Civil Servants' Act falls within the competence of the Government on the basis of Section 44 Subsection 1 of the same Act.

When drawing up such a contract it is appropriate to consider only those public officials engaged in work involving information of a particularly sensitive nature from the point of view of the interests of business or the government. The public official should be in possession of the kind of knowledge and expertise not generally available to businesses operating in the field.

The contract may be drawn up during the process of filling the vacancy or together with the public official already nominated for the position. According to Section 44 Subsection 3 of the State Civil Servants' Act both the public official's termination of his or her employment and the cancellation of the employment relationship are each to be considered as termination of this contract.

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