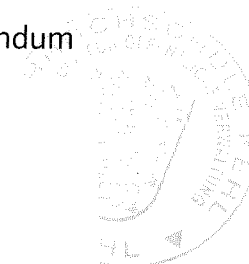


# THE STATUS OF PUBLIC OFFICIALS IN EUROPE

Recommendation No. R (2000) 6,  
adopted by the Committee of Ministers  
of the Council of Europe  
on 24 February 2000,  
and explanatory memorandum



Council of Europe Publishing

French edition:

*Le statut des agents publics en Europe (Recommandation n° R (2000) 6 et exposé des motifs)*

ISBN 92-871-4278-5

1. Recommendation No. (2000) 6, adopted by the Committee of Ministers of the Council of Europe on 24 February 2000, was prepared by the Project Group on Administrative Law (CJ-DA) under the authority of the European Committee on Legal Co-operation (CDCJ).

2. This publication contains the text of Recommendation No. R (2000) 6 and the explanatory memorandum.

Council of Europe Publishing  
F-67075 Strasbourg Cedex

ISBN 92-871-4279-3

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Printed at the Council of Europe

## Explanatory memorandum

### Introduction

Recommendation No. R (2000) 6 is the result of the work carried out by the Project Group on Administrative Law (CJ-DA) under the aegis of the European Committee on Legal Co-operation (CDCJ). The work was inspired by two recommendations: the first, Parliamentary Assembly Recommendation 1303 (1996) on the proposal for a second summit of heads of state and government of the Council of Europe, asked the Committee of Ministers to arrange for the drawing up of European legal instruments on the civil service. The second, Parliamentary Assembly Recommendation 1322 (1997) on civil service in an enlarged Europe, invited the Committee of Ministers of the Council of Europe to include in its intergovernmental work programme activities relating to the general principles of the civil service in Europe. This recommendation was itself the result of two colloquies organised by the Parliamentary Assembly in Portorož in June 1994 and in Geneva in October 1995, attended by members of parliament, government officials, experts and representatives of international organisations, and which dealt with the role and structure of the civil service in a democratic state.

In response to that recommendation, the Committee of Ministers assigned specific terms of reference to the CJ-DA, requiring it to:

- a. examine which general principles characterise the recruitment, training, ethics and status of civil servants and other public officials in European states;
- b. propose measures designed to improve the efficiency and, where appropriate, facilitate the reform of civil service in a spirit of awareness of citizens' needs;
- c. possibly prepare a recommendation for adoption by the Committee of Ministers.

In order to fulfil these terms of reference, the project group drew up a questionnaire on the status of public officials. It then decided to send it, via its members, to all Council of Europe member states and to CJ-DA observer countries. On the basis of the replies to the questionnaire, the Secretariat prepared a report on the status of public officials in Europe with the assistance of the working party of the CJ-DA and Professor Jean-Luc Bodiguel, scientific expert.

The CJ-DA drew up and adopted a draft recommendation of the Committee of Ministers to the member states on the status of public officials in Europe, on the basis of those elements of the report on which a consensus had emerged.

The project group realised the scale of the task, particularly bearing in mind the numerous reforms currently taking place.

On the basis of the themes discussed in the report on the status of public officials in Europe, the project group endeavoured to set out in the recommendation a number of principles of good practice designed to guide the member governments in their legislative work and other activities.

#### **The main body of the recommendation**

Firstly, it is recommended that the governments of member states take into account "in their law and in their practice" the principles appended to the recommendation. The recommendation merely sets out the principles and leaves it to the states to decide what steps should be taken to apply them.

Questions concerning public officials are paramount because of the important role they play in democratic societies and, primarily, in the establishment, consolidation and preservation of democratic institutions.

The general trend to reform civil service systems in order to increase their efficiency, productivity and standards of service to the public makes the recommendation particularly appropriate.

The recommendation states that, for the public administration to conform to the rule of law, be neutral, loyal to the democratic institutions and respectful of the people, it must be served by public officials possessing the characteristics listed.

Firstly, they should have the necessary qualifications. The expression "necessary qualifications" should be understood not only to cover training and level of education, but all qualities which an individual should have in order to aspire to a given post.

The recommendation states that public officials should be able to participate in decision-taking processes concerning the organisation, structure and principles governing the exercise of their functions. It should be understood that this principle is to be implemented through the intermediary of staff representatives. These representatives of public officials may have a right of consultation and/or participation in respect of the subjects mentioned above, which they may exercise by sitting on councils or committees alongside representatives of the hierarchical authorities, as explained in the report.

The recommendation also points out that public officials' duties and obligations are particularly important since they are servants of the state. However, it adds that above all they are citizens and, as such, they should have, in so far as possible, the same rights as other citizens. Any restriction of these rights should therefore be considered an exception, lawfully justified, and should be limited to what is strictly necessary for the proper functioning of the public administration. The recommendation does not suggest what kind of restrictions should be imposed in this regard.

#### **The appendix to the recommendation**

The opening paragraph of this section defines the scope of the recommendation. It states that the principles set out in the appendix apply to staff employed by the state, whatever legal regulations they come under. It is difficult to define the term "public official" on account of the different systems that exist in Europe. It may be defined from various standpoints. It may be based on the institution or body for which the person works: under this definition, a public official would be any person who works in the public services. However, this is an extremely broad definition and covers very different services from one country to another. A definition based on the person's functions is much narrower, considering a public official to be any person who performs duties for the public administration proper. This definition was used by the European Union with reference to the free movement of persons (see the interpretation of Article 48 of the Treaty establishing the European

Community). An even stricter definition would be to consider public officials as being only those who exercise public authority. This definition is used in Germany, for example, where it applies only to civil servants and excludes other employees of the public administration who do not exercise public authority. It therefore does not cover some of the officials to whom the recommendation is meant to apply.

The project group did not adopt any of these definitions. It limited the scope of the term "public officials" to state employees, including all officials whose salary is paid by the state, irrespective of the legal relationship between the employee and the state and of their place of work, as well as public officials working for state agencies. The project group therefore excluded all employees of self-governing local and regional authorities. Yet, some of the principles therein could be applied *mutadis mutandis* to the latter. It also wished to exclude, at state level, categories of staff covered by special regulations (depending on the particular country, these may include the military, police, judiciary, members of certain independent boards etc). Nevertheless, it did not mean to imply that legislation applying to these categories should not take into account the principles laid down for state officials. With regard to local and regional authority staff, it took into account the work of the Steering Committee on Local and Regional Democracy (CDLR), which has prepared a set of guidelines for drawing up legislation on the status and working conditions of local and regional authority staff. Finally, it excluded elected representatives, as was to be expected. The recommendation therefore concerns all public officials linked to the state either by the law itself (so-called "statutory" staff or civil servants) or by a private or public law contract (known as "contractual" staff or employees).

The second and third paragraphs mention the two main legal systems to which public officials may be subject: the contractual system, as in the private sector, and what is known as the career-based system. There is a fundamental distinction between the two systems. In the statutory or career-based system, officials usually enter the civil service with a view to a lifetime career, and the latter follows a set pattern. Under the contractual system, however, officials are contracted to the administrative department for the duration of their contract and may either pursue a career within the public administration generally from one contract to the next or leave it for the private sector. The project group did not comment

on the principles which might guide member states' choice of one system or the other. It is entirely up to each member state to decide. Moreover, some countries have a mixture of both systems. The project group merely stated that, whatever system is chosen, it should respect the principles of good practice listed later in the appendix to the recommendation.

#### 1. *Legal framework of public officials and implementation*

This paragraph implies that the task of defining the most important elements and key principles of the civil service should be left to the highest legislative authorities. This is why they are usually enshrined in the constitution and then developed through legislation. However, in some countries the civil service is governed by other instruments, traditional regulations, collective bargaining and agreements. Also, the term "law" should be understood in its widest sense including, by laws and regulations, unwritten legal principles and case-law, if this is how the status of public officials is regulated in a particular country. In some countries individual agreements provide the legal framework for certain public officials.

The reason for this provision, whereby the key principles of the civil service are to be defined by the highest constitutional authorities, is the need for these principles to have some degree of permanence. On the other hand, it is better if the highest legislative authorities are not involved in implementing these principles, since this might make day-to-day administration cumbersome and inefficient. Accordingly, the government should be entrusted with the task of implementing them. The government's role is explained in Section 2.

#### 2. *Authority responsible for public officials*

This principle suggests that a distinction should be made between the legal and administrative frameworks. While the general principles of the civil service should be defined by a political authority (usually the constitution and/or parliament), they should be implemented (administrative framework) by the government and/or other competent authorities. This second principle is strictly confined to administrative status.

Sections 1 and 2 therefore allocate different roles to the public authorities. The reason for this is given in the second sentence of Section 2: avoiding conflicts of competence is an important way of ensuring an efficient civil service.

### 3. *Categories and levels of public officials*

The issue underlying the existence of various categories is the need for individuals with certain occupational profiles to perform particular duties. In this context, the principle is that the main criterion for the classification of public officials into different categories or levels is the function they perform. That function is linked to a level of responsibility and, as the report explains, associated with levels of education, responsibility and salary.

Although this principle is only relevant where categories and levels exist, particularly in the career-based system, and since there are no grades, categories or levels for staff in the contractual system, it contains the notion, which is valid in both cases, that there should be a link between the function performed by public officials and their qualifications. The existence of these categories or levels is justified by the fact that not every person is capable of performing every task. Such a system would lead to politicisation or nepotism.

### 4. *Conditions and requirements for recruitment*

This paragraph sets out the two fundamental principles for the recruitment of public officials: equality of access and merit. These principles are backed up by reference to fair and open competition. The issue of equality is linked to that of non-discrimination which, since it affects several of the principles set out in the appendix, is dealt with in a specific paragraph (see Section 9). The principle of merit, meanwhile, is linked to recruitment procedures (see Section 5).

The project group discussed at length the conditions limiting the general validity of these principles, which vary considerably from one country to another and of which many examples are mentioned in the report. Thus, the constitutions of certain countries provide nationality as a general condition. The appendix to the recommendation states that these conditions should in no way conflict with the principles mentioned above and that they can only be accepted if they are required for carrying out the functions assigned to the public official. It explains that, in any case, as these requirements for recruitment constitute exceptions to these principles, they must be lawfully justified, that is established by the law as it is defined in Section 1.

### 5. *Recruitment procedures*

This section of the appendix to the recommendation is designed to cover both the contractual and career-based or statutory systems. In each case, in order to respect the principle of equal access to public posts, recruitment systems and procedures should be open and transparent, with clear rules. This means that candidates should be aware of selection procedures, particular requirements and formalities, selection dates, etc. These procedures are important if arbitrary decisions are to be avoided and equality between candidates guaranteed. The appendix to the recommendation does not state which procedures should be used to ensure that the principle of merit is applied: this is a decision for each individual government.

As the report suggests, the appendix to the recommendation does not cover people in very senior civil service posts, who are recruited in a discretionary way in many countries. Neither is it aimed at political advisers who are appointed by ministers and other senior politicians whose term of office is limited in duration to that of the person who appointed them.

The second paragraph of Section 5 of the appendix to the recommendation contains two distinct provisions. The first provision, which aims to ensure confidentiality of certain types of information provided by the candidate in the course of the selection procedure, for example: sensitive issues such as health status, as provided by the Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data (ETS No. 108, Article 6) and Recommendation No. R (91) 10 on the communication to third parties of personal data held by public bodies (Article 3). It is designed to protect people's privacy. The second provision provides for a legal remedy against the recruitment procedure in order to avoid breaches of the above-mentioned principles of equality and merit. It aims to prevent recruitment procedures from being manipulated for the purpose of politicisation of public officials or nepotism. This legal remedy does not cover the discretionary appointment of senior officials or political advisers.

### 6. *Transfers of public officials*

The transfer of public officials must be considered in the broadest terms, as it has significant consequences for the individual concerned. It is important for the administration itself, which needs a certain degree of

staff mobility to discharge its functions efficiently. Transfers are also important for officials, who should be able to change their duties or place of work and develop their careers. The fact that transfers often depend on the public official's consent or lack of consent to such changes justifies their inclusion.

Transfers may be understood in several ways. A transfer may involve a simple change to a new post at the same level within the same department and location, or to an identical post in a different department of the same administrative body (horizontal change) and same location. In these cases the public official's consent is not essential. It may involve a change of location for the person concerned, who continues to work for the same body and may or may not change jobs. Finally, it may involve the transfer of a public official from one administrative body to another, with or without a change of location and, therefore, residence. In these two last cases the public official's consent is important. Promotions which constitute an official transfer are dealt with in the next section.

Section 6 contains the principle that the public official's consent to a transfer is necessary unless the transfer is required in the public interest. Reasons of "public interest" must include any legitimate reason for the administrative body to transfer the public official from one post to another or from one place to another, particularly if such a move is necessary to ensure sound public administration, that is good management.

Since it is impossible to list all legitimate reasons for a transfer in a single text, the real purpose of a transfer can sometimes be hidden, particularly if it constitutes a disguised sanction which is not based on the rules governing disciplinary procedure. As the last sentence of this section suggests, there is therefore good reason to make provision for a legal remedy against the possible unlawfulness of a transfer carried out without the consent of the official concerned.

It should be emphasised that the question of transfers is particularly relevant to the career-based civil service system. Under the contractual system, contracts normally indicate the location of the post and the nature of the duties assigned to the official. On that basis, any transfer or change of duties requires a new contract to be drawn up unless an obligation of mobility or a change of duties was included in the original contract.

## 7. Promotions

This paragraph only deals with functional promotions, that is appointment to a more senior post or a post with greater responsibility. These usually go together with financial advancement or an increase in salary. However, financial advancement, which is not really regarded as promotion, is dealt with under the section on remuneration.

Section 7 does not say anything about the various promotion procedures, according to which promotion may be awarded on the basis of an assessment of a public official's work, a professional examination or test or a competitive examination; neither does it mention the conditions required for promotion (obligation to undergo certain training, to have completed a minimum period of service in a more junior post, etc).

This paragraph merely states that decisions concerning promotion should be based on merit. For the implementation of this principle there is an implicit reference to Sections 4 and 5, which deal with recruitment, and, more explicitly, to Section 9 on non-discrimination.

## 8. Rights

Since public officials have steadily acquired an increasing diversity of rights, different types of right need to be identified. Public officials may enjoy individual rights (such as freedom of expression), political rights (participation in political life), collective rights (usually linked to trade union rights), financial rights (remuneration) and social rights (protection against illness and accident). This general section on rights is placed before other sections which deal with certain specific rights (promotion, remuneration and training) and before the section on duties.

The text restates that of the recommendation and recognises that public officials do not enjoy special rights. They are citizens and, in so far as possible, must have the same rights as other citizens. However, they are subject to restrictions or limitations in the exercise of these rights. In this respect, the state is invited to regulate the exercise of these rights in order to make them compatible with certain duties which are inherent to work in the civil service – efficiency, for example.

Political rights and trade union rights, which include the right to contest elections, the right to form and join trade unions and the right to strike are among the most important of these rights. However, they are also

those to which the approaches in different countries vary most widely, ranging from a totally liberal attitude to actual prohibition. They are therefore mentioned specifically. Like any other citizen, public officials should have these rights. Furthermore, the recommendation, while recognising that these rights may be restricted, states that they should only be limited in so far as is necessary for the proper exercise of public functions. It is left to the individual states to decide what restrictions are "necessary" and to strike this balance.

This paragraph considers that the right to participation is not a general right, even if it tends to be applied generally. For this reason, the right to participation is distinguished from trade union rights and is dealt with in a separate section (Section 10).

#### 9. *No discrimination*

The issue of non-discrimination is mentioned in several parts of the appendix (recruitment, promotion, termination of employment). It is sufficiently important for an attempt to be made to define it. In view of the impossibility of listing them exhaustively, this paragraph merely mentions the types of discrimination most commonly referred to in national legislation. It is therefore not an exhaustive list.

Where national legislation requires nationality as a condition for access to certain public posts, this shall not be considered discrimination (see explanatory memorandum, Principle 4).

Undue discrimination is forbidden. However, in some cases positive discrimination will be lawfully justified in order to guarantee protection of certain categories of persons based on gender, language, handicap, etc.

#### 10. *Participation of public officials*

This right, which is not general, was deemed sufficiently important to merit a paragraph in the recommendation. The term "participation" may be understood in two different ways: it may be taken to mean the duty of the administration to consult its officials before taking certain decisions; this right of consultation may become participation in decision making, known in some countries as "co-management". The term "officials" means "representatives of public officials", as explained in the recommendation itself. This paragraph merely urges states to promote

consultation and participation, mentioning a number of fields where it may be relevant. Although it is not specifically stated, the group concluded that the right to participation may be considered as the right of public officials to be informed about certain aspects of the functioning of the administration (security, working hours, etc.), particularly where their career structure is concerned.

#### 11. *Social protection*

This section describes the duty of states to ensure the social protection (against illness, invalidity or death) of public officials, including provision for their retirement pensions. It does not state a view on the nature of social protection and pension schemes, which may include general social security and pension schemes applicable to all citizens, special schemes for public officials or for certain categories of public official, or even mixed schemes.

#### 12. *Remuneration*

The first sentence of this paragraph points out that public officials should have an adequate remuneration. It clearly states that the level of remuneration must be linked to the public official's responsibilities. This means that it should be mainly linked to the duties performed. It is essential to avoid preferential treatment and discrimination in this context. This section also implies (and this point is developed in the report) that remuneration comprises a number of elements: a basic salary supplemented by social allowances and performance-related bonuses.

The second sentence points out that remuneration plays an important role in achieving objectives. It further implies necessarily that the level of remuneration should be sufficient to ensure that the official enjoys a decent standard of living. This is because an inadequate salary would place public officials at an unacceptable risk of corruption or involvement in other activities incompatible with the performance of public duties. The concept of activities incompatible with the performance of public duties is explained in the following section on the duties of public officials.

#### 13. *Duties*

The duties or obligations of public officials may be considered in some countries as even more important than their rights. A balance must



therefore be struck between the two. In most European states, public officials have certain specific duties, namely a duty of respect for the rule of law, loyalty, neutrality, impartiality, integrity and discretion. Such duties are inherent in the performance of public duties. As servants of the state, public officials must comply with them and set an example. Likewise, they are required to uphold the constitution (loyalty) and the laws and regulations in force. As with rights, it is difficult to draw up an exhaustive list of duties. The CJ-DA working group mentioned specific obligations which it thought were particularly important or new. For example, respect for the public and concern for the citizen in the provision of services are perhaps the most important duties in the light of recent developments (see the handbook *The administration and you* prepared by the CJ-DA and published in 1996).

Although the text is silent on the matter, it is accepted that public officials may be absolved of certain obligations in particular circumstances. For example, in certain countries, public officials do not have to obey instructions from their hierarchical superiors if they are clearly unlawful.

The question of incompatibility, particularly the possibility for public officials to hold other posts or carry out other activities likely to create situations of conflict or incompatibility with their public duties, touches on many major issues. The question relates to political and business activities. Political incompatibility is the opposite of the duty of neutrality and, as such, is covered by the section on the rights of public officials. This section therefore deals with business incompatibility.

Business incompatibility is linked to neutrality, the level of public officials' remuneration, the question of corruption and failure to distinguish between officials' private interests and the public interest. Whilst noting that certain activities outside the civil service may benefit the performance of public functions or the public service as a whole (for example academic, literary or artistic activities), it is recommended that public officials devote themselves fully to their public duties for the reasons mentioned above. However, being mindful of the need to consider public officials as citizens, the project group did not wish to recommend that states be obliged to ban public officials from holding a second job or from participating in certain activities. This is merely a step which may be taken, depending on a country's socio-economic and cultural situation.

Despite the sometimes detailed nature of public officials' duties and the difficulty of envisaging every obligation, some countries have drawn up codes of conduct to remind officials of all their professional and moral responsibilities. Ethical issues often go beyond mere respect for the obligations placed on officials by current legislation. These codes are therefore useful in themselves as well as a means of combating corruption. The recommendation does not tackle this issue, but the project group did discuss the matter and made some observations in its report.

#### 14. *Disciplinary responsibility of public officials*

The first paragraph of this section states that public officials are responsible for carrying out the tasks entrusted to them, that this is one of their duties.

Since the consequences of failing to fulfil this obligation are rather serious – for example the institution of disciplinary proceedings, possibly resulting in disciplinary sanction (for instance, a written warning, reprimand, deferment of advancement to a higher grade or downgrading, removal from post, etc.) – it is necessary to define what procedure has to be applied by the hierarchical authorities: proceedings must be adversarial, which means that the officials concerned must have the right to a defence; they must also be entitled to be assisted by a representative of their choice; disciplinary sanctions must be lawful; and officials must have a legal remedy open to them to challenge a disciplinary decision. A "representative of their choice" should generally be taken to mean a staff representative or a legal adviser or lawyer. These staff representatives usually act under the right of participation mentioned in Section 10.

#### 15. *Training*

It is pointed out first of all that training is an essential element in making the administration more efficient. This has a number of consequences. Public officials must have both a general but not absolute right and a duty to undergo training. In so far as officials are entitled to be promoted during their career and training may be a condition for such promotion, the administration may not deny them the opportunity to undergo training, as such refusal would be discriminatory.

Conversely, the administration may require officials to undergo training in order for the service to function more efficiently. States have the task

of providing training. The reference to a relevant "training policy" shows that it is vital for public authorities to offer training to their staff and define the conditions for it. It is not stipulated whether the public administration should carry out the training itself or entrust the task to other organisations.

#### 16. *Termination of public officials' employment*

Section 16 does not state the main reasons for terminating employment: such a step may be voluntary on the public official's part, although the competent authority may not agree, or involuntary, that is not at the public official's own request.

It does not list different forms of involuntary termination, which may include compulsory retirement on grounds of age or incapacity, abolition of a post, disciplinary measure, professional unsuitability or failure to meet a condition set at the time of recruitment, for example a criminal conviction or loss of legal personality or nationality.

However, the paragraph does indicate that termination of employment should only take place in a legal framework setting out the circumstances and reasons for it. Furthermore, since termination of employment is strongly linked to misuse of authority and/or politicisation, it states that a legal remedy against the decision taken, as defined under Section 17, should be available in all cases.

#### 17. *Protection of public officials*

The first paragraph expresses an idea mentioned in a number of previous sections, that is that public officials must be entitled to protection from abuses by their employer. A legal remedy implies the possibility of taking a case to a court or other independent institution, which can be of an administrative nature.

The second paragraph affirms the state's duty to protect public officials, as holders of public authority, from hostile acts, abusive claims or other illegal acts by third parties. However, it is made quite clear that this protection by the state may only be exercised in connection with the lawful performance of an official's public duties.

#### Report on the status of public officials in Europe

The recommendation was drawn up taking into account the content of the report on the status of public officials in Europe. The intentions of those who drafted the recommendation are made clearer in that report.

The report follows largely the questionnaire on the legal status and employment conditions of public officials in the member states of the Council of Europe. Countries described problems and difficulties they were faced with. It became apparent that the questions needed to be grouped together more logically and that greater clarity was required in the way they were presented.

The report therefore sets out, in an analytical way, the methods used by the different countries to resolve or attempt to resolve the issues described in each question. The diversity of approaches and solutions to many issues is an outstanding feature of the report. This diversity reflects the history, traditions and cultures of European countries, which the project group endeavoured to respect by preparing a recommendation based on actual objectives rather than on the means of achieving them.

Attention should be drawn to Chapter VIII on the challenges facing public administration at the dawn of the new millennium. This chapter describes the different governments' efforts to improve the functioning of the machinery of government and to change management systems and the status of public officials in order to increase the effectiveness and efficiency of public administration. These efforts are part of the reason for drawing up this recommendation.

The project group regrets its failure to find recent, reliable statistics relevant only to the scope of the recommendation. The incomplete set of data it was able to collect nevertheless shows that large numbers of people are concerned by the recommendation, giving added weight to its importance.