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► **M3 COMMISSION DIRECTIVE**

of 25 June 1980

on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings

(80/723/EEC) ◀

(OJ L 195, 29.7.1980, p. 35)

Amended by:

	Official Journal		
	No	page	date
► <b><u>M1</u></b> Commission Directive 85/413/EEC of 24 July 1985	L 229	20	28.8.1985
► <b><u>M2</u></b> Commission Directive 93/84/EEC of 30 September 1993	L 254	16	12.10.1993
► <b><u>M3</u></b> Commission Directive 2000/52/EC of 26 July 2000	L 193	75	29.7.2000

NB: This consolidated version contains references to the European unit of account and/or the ecu, which from 1 January 1999 should be understood as references to the euro — Council Regulation (EEC) No 3308/80 (OJ L 345, 20.12.1980, p. 1) and Council Regulation (EC) No 1103/97 (OJ L 162, 19.6.1997, p. 1).

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## COMMISSION DIRECTIVE

of 25 June 1980

**on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings**

(80/723/EEC)

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 90 (3) thereof,

Whereas public undertakings play a substantial role in the national economy of the Member States;

Whereas the Treaty in no way prejudices the rules governing the system of property ownership in Member States and equal treatment of private and public undertakings must therefore be ensured;

Whereas the Treaty requires the Commission to ensure that Member States do not grant undertakings, public or private, aids incompatible with the common market;

Whereas, however, the complexity of the financial relations between national public authorities and public undertakings tends to hinder the performance of this duty;

Whereas a fair and effective application of the aid rules in the Treaty to both public and private undertakings will be possible only if these financial relations are made transparent;

Whereas such transparency applied to public undertakings should enable a clear distinction to be made between the role of the State as public authority and its role as proprietor;

Whereas Article 90 (1) confers certain obligations on the Member States in respect of public undertakings; whereas Article 90 (3) requires the Commission to ensure that these obligations are respected, and provides it with the requisite means to this end; whereas this entails defining the conditions for achieving transparency;

Whereas it should be made clear what is to be understood by the terms 'public authorities' and 'public undertakings';

Whereas public authorities may exercise a dominant influence on the behaviour of public undertakings not only where they are the proprietor or have a majority participation but also by virtue of powers they hold in management or supervisory bodies as a result either of the rules governing the undertaking or of the manner in which the shareholdings are distributed;

Whereas the provision of public funds to public undertakings may take place either directly or indirectly; whereas transparency must be achieved irrespective of the manner in which such provision of public funds is made; whereas it may also be necessary to ensure that adequate information is made available as regards the reasons for such provision of public funds and their actual use;

Whereas Member States may through their public undertakings seek ends other than commercial ones; whereas in some cases public undertakings are compensated by the State for financial burdens assumed by them as a result; whereas transparency should also be ensured in the case of such compensation;

Whereas certain undertakings should be excluded from the application of this Directive by virtue either of the nature of their activities or of the size of their turnover; whereas this applies to certain activities which stand outside the sphere of competition or which are already covered by specific Community measures which ensure adequate transparency, to public undertakings belonging to sectors of activity for which distinct

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provision should be made, and to those whose business is not conducted on such a scale as to justify the administration burden of ensuring transparency;

Whereas this Directive is without prejudice to other provisions of the Treaty, notably Articles 90 (2), 93 and 223;

Whereas, the undertakings in question being in competition with other undertakings, information acquired should be covered by the obligation of professional secrecy;

Whereas this Directive must be applied in close cooperation with the Member States, and where necessary be revised in the light of experience,

HAS ADOPTED THIS DIRECTIVE:

**▼M3***Article 1*

1. The Member States shall ensure that financial relations between public authorities and public undertakings are transparent as provided in this Directive, so that the following emerge clearly:

- (a) public funds made available directly by public authorities to the public undertakings concerned;
- (b) public funds made available by public authorities through the intermediary of public undertakings or financial institutions;
- (c) the use to which these public funds are actually put.

2. Without prejudice to specific provisions laid down by the Community the Member States shall ensure that the financial and organisational structure of any undertaking required to maintain separate accounts is correctly reflected in the separate accounts, so that the following emerge clearly:

- (a) the costs and revenues associated with different activities;
- (b) full details of the methods by which costs and revenues are assigned or allocated to different activities.

*Article 2*

1. For the purpose of this Directive:

- (a) 'public authorities' means all public authorities, including the State and regional, local and all other territorial authorities;
- (b) 'public undertakings' means any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it;
- (c) 'public undertakings operating in the manufacturing sector' means all undertakings whose principal area of activity, defined as being at least 50 % of total annual turnover, is in manufacturing. These undertakings are those whose operations fall to be included in Section D — Manufacturing (being subsection DA up to and including subsection DN) of the NACE (Rev.1) classification<sup>(1)</sup>;
- (d) 'undertaking required to maintain separate accounts' means any undertaking that enjoys a special or exclusive right granted by a Member State pursuant to Article 86(1) of the Treaty, or that is entrusted with the operation of a service of general economic interest pursuant to Article 86(2) of the Treaty and receives State aid in any form whatsoever, including any grant, support or compensation, in relation to such service and which carries on other activities;
- (e) 'different activities' means, on the one hand, all products or services in respect of which a special or exclusive right is granted to an

<sup>(1)</sup> OJ L 83, 3.4.1993, p. 1.

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undertaking or all services of general economic interest with which an undertaking is entrusted and, on the other hand, each other separate product or service in respect of which the undertaking is active;

- (f) 'exclusive rights' means rights that are granted by a Member State to one undertaking through any legislative, regulatory or administrative instrument, reserving it the right to provide a service or undertake an activity within a given geographical area;
- (g) 'special rights' means rights that are granted by a Member State to a limited number of undertakings, through any legislative, regulatory or administrative instrument, which, within a given geographical area:
  - limits to two or more the number of such undertakings, authorised to provide a service or undertake an activity, otherwise than according to objective, proportional and non-discriminatory criteria, or
  - designates, otherwise than according to such criteria, several competing undertakings, as being authorised to provide a service or undertake an activity, or
  - confers on any undertaking or undertakings, otherwise than according to such criteria, any legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same service or to operate the same activity in the same geographical area under substantially equivalent conditions.

2. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly in relation to an undertaking:

- (a) hold the major part of the undertaking's subscribed capital; or
- (b) control the majority of the votes attaching to shares issued by the undertakings; or
- (c) can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.

**▼B***Article 3*

The transparency referred to in ►M3 Article 1(1) ◀ shall apply in particular to the following aspects of financial relations between public authorities and public undertakings:

- (a) the setting-off of operating losses;
- (b) the provision of capital;
- (c) non-refundable grants, or loans on privileged terms;
- (d) the granting of financial advantages by forgoing profits or the recovery of sums due;
- (e) the forgoing of a normal return on public funds used;
- (f) compensation for financial burdens imposed by the public authorities.

**▼M3***Article 3a*

1. To ensure the transparency referred to in Article 1(2), the Member States shall take the measures necessary to ensure that for any undertaking required to maintain separate accounts:

- (a) the internal accounts corresponding to different activities are separate;
- (b) all costs and revenues are correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles;
- (c) the cost accounting principles according to which separate accounts are maintained are clearly established.

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2. Paragraph 1 shall only apply to activities which are not covered by specific provisions laid down by the Community and shall not affect any obligations of Member States or undertakings arising from the Treaty or from such specific provisions.

*Article 4*

1. As far as the transparency referred to in Article 1(1) is concerned, this Directive shall not apply to financial relations between the public authorities and

- (a) public undertakings, as regards services the supply of which is not liable to affect trade between Member States to an appreciable extent;
- (b) central banks;
- (c) public credit institutions, as regards deposits of public funds placed with them by public authorities on normal commercial terms;
- (d) public undertakings whose total annual net turnover over the period of the two financial years preceding that in which the funds referred to in Article 1(1) are made available or used has been less than EUR 40 million. However, for public credit institutions the corresponding threshold shall be a balance sheet total of EUR 800 million.

2. As far as the transparency referred to in Article 1(2) is concerned, this Directive shall not apply

- (a) to undertakings, as regards services the supply of which is not liable to affect trade between Member States to an appreciable extent;
- (b) to undertakings whose total annual net turnover over the period of the two financial years preceding any given year in which it enjoys a special or exclusive right granted by a Member State pursuant to Article 86(1) of the Treaty, or in which it is entrusted with the operation of a service of general economic interest pursuant to Article 86(2) of the Treaty is less than EUR 40 million; however, for public credit institutions the corresponding threshold shall be a balance sheet total of EUR 800 million;
- (c) to undertakings which have been entrusted with the operation of services of general economic interest pursuant to Article 86(2) of the Treaty if the State aid in any form whatsoever, including any grant, support or compensation they receive was fixed for an appropriate period following an open, transparent and non-discriminating procedure.

*Article 5*

1. Member States shall ensure that information concerning the financial relations referred to in Article 1(1) be kept at the disposal of the Commission for five years from the end of the financial year in which the public funds were made available to the public undertakings concerned. However, where the same funds are used during a later financial year, the five-year time limit shall run from the end of that financial year.

2. Member States shall ensure that information concerning the financial and organisational structure of undertakings referred to in Article 1(2) be kept at the disposal of the Commission for five years from the end of the financial year to which the information refers.

3. Member States shall, where the Commission considers it necessary so to request, supply to it the information referred to in paragraphs 1 and 2, together with any necessary background information, notably the objectives pursued.

▼ **M2***Article 5a*

1. Member States whose public undertakings operate in the manufacturing sector shall supply the financial information as set out

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in paragraph 2 to the Commission on an annual basis within the timetable contained in paragraph 4.

2. The financial information required for each public undertaking operating in the manufacturing sector and in accordance with paragraph 3 shall be as follows:

- (i) the annual report and annual accounts, in accordance with the definition of Council Directive 78/660/EEC <sup>(1)</sup>. The annual accounts and annual report include the balance sheet and profit/loss account, explanatory notes, together with accounting policies, statements by directors, segmental and activity reports. Moreover, notices of shareholders' meetings and any other pertinent information shall be provided.

The following details, in so far as not disclosed in the annual report and annual accounts of each public undertaking, shall also be provided:

- (ii) the provision of any share capital or quasi-capital funds similar in nature to equity, specifying the terms of its or their provision (whether ordinary, preference, deferred or convertible shares and interest rates; the dividend or conversion rights attaching thereto);
- (iii) non-refundable grants, or grants which are only refundable in certain circumstances;
- (iv) the award to the enterprise of any loans, including overdrafts and advances on capital injections, with a specification of interest rates and the terms of the loan and its security, if any, given to the lender by the enterprise receiving the loan;
- (v) guarantees given to the enterprise by public authorities in respect of loan finance (specifying terms and any charges paid by enterprises for these guarantees);
- (vi) dividends paid out and profits retained;
- (vii) any other forms of State intervention, in particular, the forgiving of sums due to the State by a public undertaking, including *inter alia* the repayment of loans, grants, payment of corporate or social taxes or any similar charges.

3. The information required by paragraph 2 shall be provided for all public undertakings whose turnover for the most recent financial year was more than ► **M3** EUR ◀ 250 million.

The information required above shall be supplied separately for each public undertaking including those located in the Member States, and shall include, where appropriate, details of all intra and inter-group transactions between different public undertakings, as well as transactions conducted directly between public undertakings and the State. The share capital referred to in paragraph 2 (ii) shall include share capital contributed by the State directly and any share capital received contributed by a public holding company or other public undertaking (including financial institutions), whether inside or outside the same group, to a given public undertaking. The relationship between the provider of the finance and the recipient shall always be specified. Similarly, the reports required in paragraph 2 shall be provided for each individual public undertaking separately, as well as for the (sub-)holding company which consolidates several public undertakings in so far as the consolidated sales of the (sub-)holding company lead to its being classified as 'manufacturing'.

Certain public enterprises split their activities into several legally distinct undertakings. For such enterprises the Commission is willing to accept one consolidated report. The consolidation should reflect the economic reality of a group of enterprises operating in the same or closely related sectors. Consolidated reports from diverse, and purely financial, holdings shall not be sufficient.

4. The information required under paragraph 2 shall be supplied to the Commission on an annual basis. The information in respect of the

<sup>(1)</sup> OJ No L 222, 14. 8. 1978, p. 11.

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financial year 1992 shall be forwarded to the Commission within two months of publication of this Directive.

For 1993 and subsequent years, the information shall be provided within 15 working days of the date of publication of the annual report of the public undertaking concerned. In any case, and specifically for undertakings which do not publish an annual report, the required information shall be submitted not later than nine months following the end of the undertaking's financial year.

In order to assess the number of companies covered by this reporting system, Member States shall supply to the Commission a list of the companies covered by this Article and their turnover, within two months of publication of this Directive. The list is to be updated by 31 March of each year.

5. This Article is applicable to companies owned or controlled by the Treuhandanstalt only from the expiry date of the special reporting system set up for Treuhandanstalt investments.

6. Member States will furnish the Commission with any additional information that it deems necessary in order to complete a thorough appraisal of the data submitted.

**▼B***Article 6*

1. The Commission shall not disclose such information supplied to it pursuant to ►M3 Article 5(3) ◀ as is of a kind covered by the obligation of professional secrecy.

2. Paragraph 1 shall not prevent publication of general information or surveys which do not contain information relating to particular public undertakings to which this Directive applies.

*Article 7*

The Commission shall regularly inform the Member States of the results of the operation of this Directive.

*Article 8*

Member States shall take the measures necessary to comply with the Directive by 31 December 1981. They shall inform the Commission thereof.

*Article 9*

This Directive is addressed to the Member States.