

COMMISSION DIRECTIVE 2006/111/EC

of 16 November 2006

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

(Text with EEA relevance)

(Codified version)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 86(3) thereof,

Whereas:

- (1) Commission Directive 80/723/EEC 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⁽¹⁾ has been substantially amended several times⁽²⁾. In the interests of clarity and rationality the said Directive should be codified.
- (2) Public undertakings play a substantial role in the national economy of the Member States.
- (3) Member States sometimes grant special or exclusive rights to particular undertakings, or make payments or give some other kind of compensation to particular undertakings entrusted with the operation of services of general economic interest. These undertakings are often also in competition with other undertakings.
- (4) Article 295 of the Treaty provides that the Treaty is in no way to prejudice the rules in Member States governing the system of property ownership. There should be no unjustified discrimination between public and private undertakings in the application of the rules on competition. This Directive should apply to both public and private undertakings.
- (5) The Treaty requires the Commission to ensure that Member States do not grant undertakings, public or private, aids incompatible with the common market.
- (6) However, the complexity of the financial relations between national public authorities and public undertakings tends to hinder the performance of this duty.
- (7) 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.
- (8) 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.
- (9) Article 86(1) of the Treaty imposes obligations on Member States in the case of public undertakings and undertakings to which Member States grant special or exclusive rights. Article 86(2) of the Treaty applies to undertakings entrusted with the operation of services of general economic interest. Article 86(3) of the Treaty requires the Commission to ensure the application of the provisions of that Article and provides it with the requisite means to this end. In order to ensure the application of the provisions of Article 86 of the Treaty the Commission must have the necessary information. This entails defining the conditions for ensuring such transparency.
- (10) It should be made clear what is to be understood by the terms 'public authorities' and 'public undertakings'.
- (11) The Member States have differing administrative territorial structures. This Directive should cover public authorities at all levels in each Member State.
- (12) 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.
- (13) The provision of public funds to public undertakings may take place either directly or indirectly. Transparency must be achieved irrespective of the manner in which such provision of public funds is made. 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.

⁽¹⁾ OJ L 195, 29.7.1980, p. 35. Directive as last amended by Directive 2005/81/EC (OJ L 312, 29.11.2005, p. 47).

⁽²⁾ See Annex I, Part A.

- (14) Complex situations linked to the diverse forms of public and private undertakings granted special or exclusive rights or entrusted with the operation of services of general economic interest as well as the range of activities that might be carried on by a single undertaking and the different degrees of market liberalisation in the various Member States could complicate application of the competition rules, and particularly Article 86 of the Treaty. It is therefore necessary for Member States and the Commission to have detailed data about the internal and financial and organisational structure of such undertakings, in particular separate and reliable accounts relating to different activities carried on by the same undertaking.
- (15) The accounts should show the distinction between different activities, the costs and revenues associated with each activity and the methods of cost and revenue assignment and allocation. Such separate accounts should be available in relation to, on the one hand, products and services in respect of which the Member State has granted a special or exclusive right or entrusted the undertaking with the operation of a service of general economic interest, as well as, on the other hand, for each other product or service in respect of which the undertaking is active. The obligation of separation of accounts should not apply to undertakings whose activities are limited to the provision of services of general economic interest and which do not operate activities outside the scope of these services of general economic interest. It does not seem necessary to require separation of accounts within the area of services of general economic interest or within the area of the special or exclusive rights, as far as this is not necessary for the cost and revenue allocation between these services and products and those outside the services of general economic interest or the special or exclusive rights.
- (16) Requiring Member States to ensure that the relevant undertakings maintain such separate accounts is the most efficient means by which fair and effective application of the rules of competition to such undertakings can be assured. In 1996 the Commission adopted a Communication on services of general interest in Europe ⁽¹⁾, which was supplemented by another Communication in 2001 ⁽²⁾, in which it emphasised the importance of such services. It is necessary to take account of the importance of the sectors concerned, which may involve services of general interest, the strong market position that the relevant undertakings may have and the vulnerability of emerging competition in the sectors being liberalised. In accordance with the principle of proportionality it is necessary and appropriate for the achievement of the basic objective of transparency to lay down rules on such separate accounts. This Directive does not go beyond what is necessary in order to achieve the objectives pursued, in accordance with the provisions of the third paragraph of Article 5 of the Treaty.
- (17) In certain sectors provisions adopted by the Community require Member States and certain undertakings to maintain separate accounts. It is necessary to ensure an equal treatment for all economic activities throughout the Community and to extend the requirement to maintain separate accounts to all comparable situations. This Directive should not amend specific rules established for the same purpose in other Community provisions and should not apply to activities of undertakings covered by those provisions.
- (18) Certain undertakings should be excluded from the application of this Directive by virtue of the size of their turnover. This applies to those public undertakings whose business is not conducted on such a scale as to justify the administrative burden of ensuring transparency. In view of the limited potential for an effect on trade between Member States, it is not necessary, at this time, to require separate accounts in relation to the supply of certain categories of services.
- (19) This Directive is without prejudice to other provisions of the Treaty, notably Articles 86(2), 88 and 296, and to any other rules concerning the provision of information by Member States to the Commission.
- (20) In cases where the compensation for the fulfilment of services of general economic interest has been fixed for an appropriate period following an open, transparent and non-discriminatory procedure it does not seem necessary to require such undertakings to maintain separate accounts.
- (21) The undertakings in question being in competition with other undertakings, information acquired should be covered by the obligation of professional secrecy.
- (22) A reporting system based on *ex post facto* checks of the financial flows between public authorities and public undertakings operating in the manufacturing sector will enable the Commission to fulfil its obligations. That system of control must cover specific financial information.
- (23) In order to limit the administrative burden on Member States, the reporting system should make use of both publicly available data and information available to majority shareholders. The presentation of consolidated reports is to be permitted. Incompatible aid to major undertakings operating in the manufacturing sector will have the greatest distortive effect on competition in the common market. Therefore, such a reporting system may at present be limited to undertakings with a yearly turnover of more than EUR 250 million.

⁽¹⁾ OJ C 281, 26.9.1996, p. 3.

⁽²⁾ OJ C 17, 19.1.2001, p. 4.

(24) This Directive should be without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives set out in Annex I, Part B,

HAS ADOPTED THIS DIRECTIVE:

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

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.

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

- (i) hold the major part of the undertaking's subscribed capital; or

(ii) control the majority of the votes attaching to shares issued by the undertakings; or

(iii) can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body;

(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 under Section D — Manufacturing being subsection DA up to and including subsection DN of the NACE (Rev.1) classification ⁽¹⁾;

(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 is entrusted with the operation of a service of general economic interest pursuant to Article 86(2) of the Treaty, that receives public service compensation in any form whatsoever in relation to such service and that 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 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:

(i) 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

(ii) designates, otherwise than according to such criteria, several competing undertakings, as being authorised to provide a service or undertake an activity; or

⁽¹⁾ OJ L 83, 3.4.1993, p. 1.

(iii) 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.

Article 3

The transparency referred to in 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.

Article 4

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.

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 5

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 compensation they receive, in any form whatsoever, was fixed for an appropriate period following an open, transparent and non-discriminating procedure.

Article 6

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.

Article 7

The Commission shall not disclose such information supplied to it pursuant to Article 6(3) as is of a kind covered by the obligation of professional secrecy.

The first paragraph 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 8

1. Member States whose public undertakings operate in the manufacturing sector shall supply the financial information as set out in paragraphs 2 and 3 to the Commission on an annual basis within the timetable contained in paragraph 5.

2. The financial information required for each public undertaking operating in the manufacturing sector and in accordance with paragraph 4 shall be the annual report and annual accounts, in accordance with the definition of Council Directive 78/660/EEC⁽¹⁾. 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 reports required shall be provided for each individual public undertaking separately, as well as for the holding or subholding company which consolidates several public undertakings in so far as the consolidated sales of the holding or subholding company lead to its being classified as 'manufacturing'.

3. The following details, in so far as not disclosed in the annual report and annual accounts of each public undertaking, shall be provided in addition to the information referred to in paragraph 2:

- (a) 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);
- (b) non-refundable grants, or grants which are only refundable in certain circumstances;
- (c) 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;
- (d) guarantees given to the enterprise by public authorities in respect of loan finance (specifying terms and any charges paid by enterprises for these guarantees);
- (e) dividends paid out and profits retained;
- (f) any other forms of State intervention, in particular, the forgoing 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.

The share capital referred to in (a) 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.

4. The information required by paragraphs 2 and 3 shall be provided for all public undertakings whose turnover for the most recent financial year was more than EUR 250 million.

The information required above shall be supplied separately for each public undertaking including those located in other 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.

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.

⁽¹⁾ OJ L 222, 14.8.1978, p. 11.

5. The information required under paragraphs 2 and 3 shall be supplied to the Commission on an annual basis.

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.

6. 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. The list is to be updated by 31 March of each year.

7. 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.

Article 9

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

Article 10

Directive 80/723/EEC, as amended by the Directives listed in Annex I, Part A, is repealed, without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives set out in Annex I, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

Article 11

This Directive shall enter into force on 20 December 2006.

Article 12

This Directive is addressed to the Member States.

Done at Brussels, 16 November 2006.

For the Commission

Neelie KROES

Member of the Commission

ANNEX I

PART A

REPEALED DIRECTIVE WITH ITS SUCCESSIVE AMENDMENTS

(referred to in Article 10)

Commission Directive 80/723/EEC	(OJ L 195, 29.7.1980, p. 35)
Commission Directive 85/413/EEC	(OJ L 229, 28.8.1985, p. 20)
Commission Directive 93/84/EEC	(OJ L 254, 12.10.1993, p. 16)
Commission Directive 2000/52/EC	(OJ L 193, 29.7.2000, p. 75)
Commission Directive 2005/81/EC	(OJ L 312, 29.11.2005, p. 47)

PART B

LIST OF TIME LIMITS FOR TRANSPOSITION INTO NATIONAL LAW

(referred to in Article 10)

Directive	Time limit for transposition
80/723/EEC	31 December 1981
85/413/EEC	1 January 1986
93/84/EEC	1 November 1993
2000/52/EC	31 July 2001
2005/81/EC	19 December 2006

ANNEX II

CORRELATION TABLE

Directive 80/723/EEC	This Directive
Article 1	Article 1
Article 2(1), introductory sentence	Article 2, introductory sentence
Article 2(1), point (a)	Article 2, point (a)
Article 2(1), point (b)	Article 2, point (b), first subparagraph
Article 2(1), points (c) to (f)	Article 2, points (c) to (f)
Article 2(1), point (g), introductory words	Article 2, point (g), introductory words
Article 2(1), point (g), first indent	Article 2, point (g)(i)
Article 2(1), point (g), second indent	Article 2, point (g)(ii)
Article 2(1), point (g), third indent	Article 2, point (g)(iii)
Article 2(2), introductory sentence	Article 2, point (b), second subparagraph, introductory sentence
Article 2(2), point (a)	Article 2, point (b), second subparagraph, point (i)
Article 2(2), point (b)	Article 2, point (b), second subparagraph, point (ii)
Article 2(2), point (c)	Article 2, point (b), second subparagraph, point (iii)
Article 3	Article 3
Article 3a	Article 4
Article 4	Article 5
Article 5	Article 6
Article 5a(1)	Article 8(1)
Article 5a(2), first subparagraph, introductory sentence	Article 8(2), first subparagraph
Article 5a(2), first subparagraph, point (i)	Article 8(2), first subparagraph
Article 5a(2), second subparagraph, introductory sentence	Article 8(3), first subparagraph, introductory sentence
Article 5a(2), second subparagraph, point (ii)	Article 8(3), first subparagraph, point (a)
Article 5a(2), second subparagraph, point (iii)	Article 8(3), first subparagraph, point (b)
Article 5a(2), second subparagraph, point (iv)	Article 8(3), first subparagraph, point (c)
Article 5a(2), second subparagraph, point (v)	Article 8(3), first subparagraph, point (d)
Article 5a(2), second subparagraph, point (vi)	Article 8(3), first subparagraph, point (e)
Article 5a(2), second subparagraph, point (vii)	Article 8(3), first subparagraph, point (f)
Article 5a(3), first subparagraph	Article 8(4), first subparagraph
Article 5a(3), second subparagraph, first sentence	Article 8(4), second subparagraph
Article 5a(3), second subparagraph, second sentence	Article 8(3), second subparagraph, first sentence
Article 5a(3), second subparagraph, third sentence	Article 8(3), second subparagraph, second sentence
Article 5a(3), second subparagraph, last sentence	Article 8(2), second subparagraph
Article 5a(3), third subparagraph	Article 8(4), third subparagraph

Directive 80/723/EEC	This Directive
Article 5a(4), first subparagraph	Article 8(5), first subparagraph
Article 5a(4), second subparagraph	Article 8(5), second subparagraph
Article 5a(4), third subparagraph	Article 8(6)
Article 5a(5)	—
Article 5a(6)	Article 8(7)
Article 6(1)	Article 7, first paragraph
Article 6(2)	Article 7, second paragraph
Article 7	Article 9
Article 8	—
—	Article 10
—	Article 11
Article 9	Article 12
—	Annex I
—	Annex II