

2009 No. 2331

EUROPEAN COMMUNITIES

The Financial Transparency (EC Directive) Regulations 2009

Made - - - - *27th August 2009*

Laid before Parliament *1st September 2009*

Coming into force - - *22nd September 2009*

The Secretary of State, being a Minister designated(a) for the purposes of section 2(2) of the European Communities Act 1972(b) in relation to measures on the transparency of financial relations between public authorities and public undertakings and on financial transparency within certain undertakings, in exercise of the powers conferred by that section, makes the following Regulations—

PART 1
GENERAL

Citation and commencement

1. These Regulations may be cited as the Financial Transparency (EC Directive) Regulations 2009 and shall come into force on 22nd September 2009.

Interpretation

2.—(1) In these Regulations—

“compensation” shall be construed as aid in any form whatsoever, including grant or support in accordance with Article 87 of the Treaty;

“contract” shall be construed as any agreement linking a public authority to a public undertaking in respect of compensation;

“entrusted” shall be construed in accordance with Article 86(2) of the Treaty;

“exclusive right” means any right granted by a public authority to an undertaking through any legislative, regulatory or administrative means, reserving to it the right to provide a service or undertake an activity within a geographical area;

(a) SI 2005/850.

(b) 1972 c. 68.

“Financial Transparency Directive” means Commission Directive 2006/111/EC(a) 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;

“public authority” includes the Crown and any regional, local or other territorial authority;

“public undertaking” means any undertaking over which a public authority may exercise, directly or indirectly, a dominant influence by virtue of its ownership of it, its financial participation in it, or the rules which govern it; a dominant influence is presumed when a public authority, directly or indirectly, in relation to an undertaking—

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

“public undertaking operating in the manufacturing sector” means any public undertaking which has at least 50% of its total annual turnover arising from operations which are included in Section D of the Annex to Council Regulation (EEC) No 3037/90 of 9 October 1990 on the statistical classification of economic activities in the European Community(b);

“services of general economic interest” shall be construed in accordance with Article 86(2) of the Treaty;

“share” shall be construed in accordance with section 540 of the Companies Act 2006(c);

“special right” means any right that is granted by a public authority through any legislative, regulatory or administrative means, which, within a geographical area and otherwise than in accordance with objective, proportional and non-discriminatory criteria—

- (a) limits to two or more the number of undertakings authorised to provide a service or undertake an activity;
- (b) designates several competing undertakings as being authorised to provide a service or undertake an activity; or
- (c) confers on any undertaking any legal or regulatory advantages which substantially affect the ability of any other undertaking to operate the same activity in the same geographical area under substantially equivalent conditions;

“Treaty” means the Treaty establishing the European Community; and

“undertaking” means any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.

(2) These Regulations do not apply where Article 296 of the Treaty applies to a contract.

PART 2

PUBLIC UNDERTAKINGS

Maintenance of records

3.—(1) A public undertaking shall maintain records of any public funds made available to it—

- (a) directly by a public authority, or
- (b) by a public authority through another public undertaking or financial institution.

(a) Commission Directive 2006/111/EC (OJ L 318 17.11.2006 p.17) consolidated Commission Directive 80/723/EEC of 25 June 1980 (OJ L 195, 29.07.1980, p.35) as amended by Commission Directive 85/413/EEC of 24 July 1985, (OJ L 229, 28.08.1985, p.20.), Commission Directive 93/84/EEC of 30 September 1993 (OJ L 254, 12.10.1993, p.16), Commission Directive 2000/52/EC of 26 July 2000 (OJ L 193, 29.07.2000, p.75) and Commission Directive 2005/81/EC of 28 November 2005 (OJ L 312, 29.11.2005, p.47).

(b) L293, 24.10.90, p.1, as amended by OJ L 83, 3.4.1993, p.1.

(c) 2006 c.46.

(2) For the purposes of paragraph (1) the activities regarded as making public funds available to a public undertaking shall include—

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

(3) Nothing in paragraph (2) shall be construed as affecting the generality of paragraph (1).

(4) A public undertaking which receives public funds in relation to which it is required to maintain records under paragraph (1) shall maintain a record of the use to which those public funds are put.

(5) The obligations in paragraphs (1) and (4) shall not apply—

- (a) where a public authority makes public funds available to another public authority;
- (b) in relation to any public funds received by a public undertaking in relation to services supplied by a public undertaking which are not liable to affect trade between Member States within the meaning of the Treaty to an appreciable extent;
- (c) to the Bank of England;
- (d) to deposits of public funds placed with a public credit institution by a public authority on normal commercial terms;
- (e) to a public undertaking, other than a public credit institution, whose total annual net turnover—
 - (i) in each of the two financial years preceding any financial year in which the funds referred to in paragraph (1) are made available, in relation to the obligation in paragraph (1), or
 - (ii) in each of the two financial years preceding any financial year in which the funds referred to in paragraph (1) are used, in relation to the obligations in paragraph (4), is less than 40 million euros; or
- (f) to a public credit institution whose balance sheet total—
 - (i) in each of the two financial years preceding any financial year in which the funds referred to in paragraph (1) are made available, in relation to the obligation in paragraph (1), or
 - (ii) in each of the two financial years preceding any financial year in which the funds referred to in paragraph (1) are used, in relation to the obligation in paragraph (4), is less than 800 million euros.

Retention of records by public undertakings

4.—(1) A public undertaking shall retain the records which are required to be maintained under regulation 3(1) from the time that the public funds are provided until a period of five years has elapsed from the last day of the financial year in which the public funds were last used.

(2) A public undertaking shall retain the records which are required to be maintained under regulation 3(4) from the time that the public funds are used until a period of five years has elapsed from the last day of the financial year in which the public funds were last used.

Provision of information by public undertakings

5. Within 28 days of receipt of a written request by the Secretary of State, a public undertaking shall provide the Secretary of State with—

- (a) such information, in such form, as is requested concerning the records (this may include copies of the records) which the undertaking is required to maintain under regulation 3(1) and 3(4); and
- (b) such further information as is requested and considered necessary by the Secretary of State to fulfil the United Kingdom's obligations under the Financial Transparency Directive.

PART 3

UNDERTAKINGS REQUIRED TO MAINTAIN SEPARATE ACCOUNTS

Maintenance of separate accounts

6.—(1) An undertaking which is—

- (a) granted a special right or an exclusive right, or
- (b) entrusted with any service of general economic interest and receives public service compensation, in any form whatsoever, in relation to that service,

and carries on an activity not covered by (a) or (b), shall maintain separate accounts in respect of its activities under paragraphs (a) and (b) and any other of its activities which fall outside of those paragraphs.

(2) The separate accounts referred to in paragraph (1) shall—

- (a) show the costs and revenues associated with each of its activities;
- (b) show the full details of the methods by which costs and revenues are assigned or allocated to each of its activities;
- (c) show that the internal accounts corresponding to each of its activities are separate; and
- (d) be based on clearly established, consistently applied and objectively justifiable cost accounting principles.

(3) This regulation shall not apply—

- (a) to activities in respect of which other provisions in relation to financial transparency within undertakings have been laid down by the Communities;
- (b) in relation to services supplied by an undertaking which are not liable to affect trade between Member States within the meaning of the Treaty to an appreciable extent;
- (c) to an undertaking, other than a public credit institution, whose total annual net turnover in each of the two financial years preceding the financial year in which it enjoys a special right or an exclusive right, or in which it is entrusted with a service of general economic interest, is less than 40 million euros;
- (d) to a public credit institution whose balance sheet total in each of the two financial years preceding the financial year in which it enjoys a special right or an exclusive right, or in which it is entrusted with a service of general economic interest, is less than 800 million euros; or
- (e) to an undertaking which is entrusted with the operation of a service of general economic interest pursuant to Article 86(2) of the Treaty if the compensation it receives, in any form, was fixed for an appropriate period following an open, transparent and non-discriminatory procedure.

Retention of separate accounts

7. An undertaking required to maintain separate accounts under regulation 6(1) shall retain the separate accounts for a period of five years starting on the last day of the financial year to which those accounts relate.

Provision of information by undertakings required to maintain separate accounts

8. Within 28 days of receipt of a written request by the Secretary of State, an undertaking required to maintain separate accounts under regulation 6(1) shall provide the Secretary of State with—

- (a) such information, in such form, as is requested concerning the separate accounts (this may include copies of the separate accounts) which the undertaking is required to maintain under regulation 6(1); and
- (b) such further information as is requested and considered necessary by the Secretary of State to fulfil the United Kingdom's obligations under the Financial Transparency Directive.

PART 4

PUBLIC UNDERTAKINGS OPERATING IN THE MANUFACTURING SECTOR

Provision of information by public undertakings operating in the manufacturing sector

9.—(1) A public undertaking operating in the manufacturing sector shall provide the following information to the Secretary of State relating to each financial year—

- (a) a copy of its annual report and annual accounts (as each term is defined in section 471 of the Companies Act 2006), explanatory notes, accounting policies, statements by directors, segmental and activity reports and any other pertinent information;
- (b) a copy of any notices of shareholder meetings relating to that financial year; and
- (c) information concerning the occurrences described in paragraph (4), insofar as that information is not included in its annual report and annual accounts.

(2) The information required under paragraph (1) shall—

- (a) where appropriate, specify the relationship between the provider of finance and the public undertaking operating in the manufacturing sector;
- (b) where appropriate, include details of intra-group and inter-group transactions between different public undertakings; and
- (c) where appropriate, include details of transactions conducted between public undertakings and public authorities.

(3) The information required under paragraph (1) shall be provided to the Secretary of State within—

- (a) 10 working days of the date of the publication, if any, of the annual report of the public undertaking concerned, or
- (b) eight months following the end of the undertaking's financial year, whichever is the earlier.

(4) The occurrences for the purposes of paragraph (1)(c) are—

- (a) the provision of any share capital (including by a public authority, a public holding company or another public undertaking) 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 and any dividend or conversion rights attaching thereto);
- (b) the award to it of any non-refundable grants which are only refundable in certain circumstances;
- (c) the award to it of any loans including overdrafts and advances on capital injections, specifying the interest rates and the terms of the loan and the security given, if any, to the lender by the undertaking receiving the loan;

- (d) any guarantees given to it by a public authority in respect of loan finance (specifying the terms and charges, if any, paid by the public undertaking for the guarantee);
- (e) any dividends paid out and profits retained; and
- (f) any other financial advantage provided by a public authority, including the forgiving of sums due to a public authority by the public undertaking, such as the repayment of loans, grants, payment of corporate or social taxes or any similar charges.

(5) Within 28 days of receipt of a written request by the Secretary of State, a public undertaking operating in the manufacturing sector shall provide the Secretary of State with such further information as is requested and considered necessary to fulfil the United Kingdom's obligations under the Financial Transparency Directive.

(6) Paragraphs (1) and (5) shall not apply to public undertakings with a turnover in the previous financial year of 250 million euros or less.

Consolidated information by groups

10. Where two or more public undertakings subject to regulation 9 are members of a group of public undertakings and carry out activities in the same or closely related sectors, the information required by regulation 9(1) may be provided in relation to those undertakings in consolidated form rather than in relation to each undertaking separately.

PART 5

CONTRACT TERMS

11. Where a public authority is a party to a contract that public authority shall ensure that the contract contains the elements specified in—

- (a) Regulations 3, 4 and 5, in respect of public undertakings;
- (b) Regulations 6, 7 and 8, in respect of an undertaking required to maintain separate accounts; and
- (c) Regulation 9 in respect of public undertakings operating in the manufacturing sector.

12. It is an implied term of a contract that undertakings to the contract comply with the provisions of—

- (a) Regulations 3, 4 and 5, in respect of public undertakings;
- (b) Regulations 6, 7 and 8, in respect of an undertaking required to maintain separate accounts; and
- (c) Regulation 9 in respect of public undertakings operating in the manufacturing sector.

27th August 2009

Kevin Brennan
Minister for Further Education, Skills, Apprenticeships and Consumer Affairs
Department for Business, Innovation and Skills

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement 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 transparency within certain undertakings.

Regulation 3 requires a public undertaking to maintain records of any public funds which are made available to it either directly by a public authority, or by a public authority through another public undertaking or financial institution.

Regulation 6 requires certain undertakings to keep separate accounts showing the costs and revenues associated with different activities and full details of the methods by which costs and revenues are assigned or allocated to different activities.

Regulations 4 and 7 set out the period of time for which the records and accounts referred to in Regulations 3 and 6 should be retained.

Regulations 5 and 8 provide that public undertakings and undertakings required to maintain separate accounts shall upon request provide the Secretary of State with certain information.

Regulation 9 requires public undertakings operating in the manufacturing sector to provide the Secretary of State with certain information each financial year and with such further information as is requested. Regulation 10 provides that where information is required under regulation 9 it may be provided in consolidated form where two or more public undertakings are members of a group of public undertakings.

Regulation 11 requires public authorities who are party to a contract for compensation with a public undertaking to ensure that the relevant provisions of these Regulations are contained within that contract.

Regulation 12 inserts implied terms into contracts linking public authorities to public undertakings in respect of compensation.

A full Impact Assessment has been carried out and a copy has been placed in the libraries of both Houses of Parliament. Copies may be obtained from the State Aid Branch of the Department for Business, Innovation and Skills, 1 Victoria Street, London, SW1H 0ET.

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STATUTORY INSTRUMENTS

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The Financial Transparency (EC Directive) Regulations 2009

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