

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DIRECTIVE 93/84/EEC

of 30 September 1993

amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Whereas Commission Directive 80/723/EEC⁽¹⁾, as amended by Directive 85/413/EEC⁽²⁾, introduced a system whereby Member States were placed under an obligation to ensure that financial relations between public authorities and public undertakings are transparent; whereas that Directive required certain financial information to be retained by Member States and supplied to the Commission when requested;

Whereas Directive 80/723/EEC contains provisions, particularly in Articles 3 and 5, which may facilitate the Commission's task in meeting the obligations it has assumed;

Whereas public undertakings play an important role in the economies of Member States; whereas the need for transparency of financial relations between the Member States and their public undertakings has proved greater than before, on account of developments in the competitive situation in the common market, especially as the Community is moving towards close economic integration and social cohesion;

Whereas the Member States have adopted a Single European Act which in turn has led to the creation of the Single Market with effect from 1 January 1993; whereas this will lead to greater competitive pressures and to a need for the Commission to be vigilant in ensuring that the full benefits of the Single Market are achieved; whereas the Single Market makes it increasingly necessary

to ensure that an equality of opportunity exists between both public and private undertakings;

Whereas it has been established that a significant part of the financial flows between a State and its public undertakings pass through a variety of forms of financial transfers and do not simply take the form of capital or quasi-capital injections;

Whereas it is predominantly in the manufacturing sector that the Commission has established that a considerable amount of aid has been granted to undertakings but not notified pursuant to Article 93 (3) of the Treaty; whereas the first⁽³⁾, second⁽⁴⁾ and third⁽⁵⁾ State aid surveys confirm that large amounts of State aid continue to be granted illegally;

Whereas a reporting system based on *ex post facto* checks of the financial flows between public authorities and public undertakings will enable the Commission to fulfil its obligations; whereas that system of control must cover specific financial information; whereas such information is not always publicly available and, as it is found in the public arena, is insufficiently detailed to allow a proper evaluation of the financial flows between the State and public undertakings;

Whereas all of the information requested can be regarded as being proportional to the objective pursued, taking account of the fact that such information is already subject to the disclosure obligations under the Fourth Council Directive 78/660/EEC⁽⁶⁾ concerning the annual accounts of companies, as last amended by Directive 90/605/EEC⁽⁷⁾;

⁽¹⁾ OJ No L 195, 29. 7. 1980, p. 35.

⁽²⁾ OJ No L 229, 28. 8. 1985, p. 20.

⁽³⁾ ISBN 92-825-9535.

⁽⁴⁾ ISBN 9-826-0386.

⁽⁵⁾ ISBN 92-826-4637.

⁽⁶⁾ OJ No L 222, 14. 8. 1978, p. 11.

⁽⁷⁾ OJ No L 317, 16. 11. 1990, p. 60.

Whereas, in order to limit the administrative burden on Member States, the reporting system should make use of both publicly available data and information available majority shareholders; whereas the presentation of consolidated reports is to be permitted; whereas incompatible aid to major undertakings operating in the manufacturing sector will have the greatest distortive effect on competition in the common market; whereas, therefore, such a reporting system may at present be limited to undertakings with a yearly turnover of more than ECU 250 million;

Whereas, although the Commission, when notifying the Directive in 1980, took the view that movements of funds within a public undertaking or group of public undertakings were not subject to the requirements of Directive 80/723/EEC, the inclusion of such information is called for by the new requirements of economic life, which is often influenced by State intervention via public undertakings; whereas, as has been underlined in the case-law of the Court of Justice since 1980⁽¹⁾, infringements of the provisions of Article 93 (3) by Member States have increased appreciably, thereby making the Commission's monitoring tasks in the field of competition more and more difficult; whereas the Commission's powers of vigilance must therefore be increased,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 80/723/EEC is amended as follows:

1. in Article 2, the following indent is added:

— "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^(*).

^(*) OJ No L 83, 3. 4. 1993;

2. Article 5a is inserted as follows:

Article 5a

1. Member States whose public undertakings operate in the manufacturing sector shall supply the financial information as set out 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^(*). 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 ECU 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 direct between public undertaking and the State. The share capital referred to in

⁽¹⁾ See, for example, the Judgments in Case 290/83 Commission v. France [1985] ECR, 439 (agriculture credit fund), Joined Cases 67, 68 and 70/85 Van der Kooy v. Commission [1988] ECR, p. 219, Case 303/88 Italy v. Commission [1991] ECR-I, p. 1433 (ENI-Lanerossi) and Case C-305/89 Italy v. Commission [1991] ECR-I, p. 1603 (IRI, Finmeccanica and Alfa Romeo).

paragraph 2 (ii) shall include share capital contributed by the State direct 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 undertakings 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 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.

(*) OJ No L 222, 14. 8. 1978, p. 11.

Article 2

Member States shall adopt the provisions necessary to comply with this Directive by 1 November 1993. They shall inform the Commission thereof immediately.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

Article 3

This Directive is addressed to the Member States.

Done at Brussels, 30 September 1993.

For the Commission

Karel VAN MIERT

Vice-President