L.N. 45 of 2005

FINANCIAL ADMINISTRATION AND AUDIT ACT (CAP. 174)

Transparency of Financial Relations between the State and Public Undertakings Regulations, 2005

IN exercise of the powers conferred by article 4 of the Financial Administration and Audit Act, the Prime Minister and Minister of Finance has made the following regulations:-

Title.

1. The title of these regulations is the Transparency of Financial Relations between the State and Public Undertakings Regulations, 2005.

Interpretation.

2. In these regulations, unless the context otherwise requires:

"the Commission" means the Commission of the European Union as established in the Treaty as subsequently amended;

"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;

"the Directive" means 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 as amended by Directive 85/413/EEC of 24 July, 1985, Directive 93/84/EEC of 30 September, 1993 and Directive 2000/52/EEC of 26 July, 2000;

"dominant influence" means -

(a) the holding of the major part of the undertaking's subscribed capital; or

(b) control over the majority of the votes attaching to shares issued by the undertaking; or

(c) the capacity to appoint more than half of the members of the undertaking's administrative, managerial, or supervisory body;

"exclusive right" means the right that is granted by the Government of Malta to one undertaking through any legislative, regulatory, or administrative instrument, reserving it the right to provide a service or undertake an activity;

"Member States" means a member state of the European Union;

"public undertakings" means any undertaking or entity over which the Government of Malta may exercise directly or indirectly a dominant influence by virtue of its ownership in it, financial participation therein, or rules which govern it;

"public undertakings in the manufacturing sector' means all undertakings whose principal area of activity, defined as being at least 50% of the 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;

"special right" means the right that is granted by the Government of Malta to a limited number of undertakings, through any legislative, regulatory, or administrative instrument, which:

(a) 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

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

(c) 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 under substantially equivalent conditions;

"Treaty" has the same meaning as in Article 2 of the European Union Act.

Transparency of financial relations.

3. (1) Any financial relations between the Government of Malta and public undertakings shall be transparent as provided in the Directive.

(2) In such financial relations, therefore, the following shall emerge clearly:

(a) public funds made available by the Government of Malta to the public undertakings concerned;

(b) public funds made available by the Government of Malta through the intermediary of public undertakings or financial institutions;

(c) the use to which these public funds are actually put.

(3) The transparency referred to in this regulation shall apply in particular to the following aspects of financial relations between the Government of Malta 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) compensation for financial burdens imposed by the Government of Malta.

(f) the forgoing of a normal return on public funds used.

Public undertakings to which transparency requirements do not apply.

4. The transparency requirements referred to in regulation 3 of these regulations shall not apply to financial relations between the Government of Malta 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) the Central Bank of Malta;

(c) public credit institutions, as regards deposits of public funds placed with them by the Government of Malta 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 regulation 3 of these regulations are made available or used has been less than Euro 40 million except for public credit institutions where the corresponding threshold shall be a balance sheet total of Euro 800 million.

Public undertakings required to maintain separate accounts.

5. (1) A public undertaking that enjoys a special or exclusive right granted by the Government of Malta 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, is required to maintain separate accounts that reflect clearly its financial and organisational structure in:

(a) the costs and revenues associated with different activities;

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

(2) For the purpose of sub-regulation (1) of this regulation, an undertaking that is required to maintain separate accounts shall take the following measures:

(a) the internal accounts corresponding to different activities shall be kept separate;

(b) all costs and revenues shall be 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 shall be clearly established:

Provided that the requirements in this regulation shall not apply to:

(i) undertakings, as regards services the supply of which is not liable to affect trade between Member States to an appreciable extent;

(ii) undertakings whose total annual net turnover over the period of the two financial years preceding any given year in which they enjoy a special or exclusive right granted by the Government of Malta pursuant to Article 86(1) of the Treaty, or in which they are entrusted with the operation of a

service of general economic interest pursuant to Article 86(2) of the Treaty is less than Euro 40 million, except for public credit institutions where the corresponding threshold shall be a balance sheet total of Euro 800million;

(iii) 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-discriminatory procedure.

Public undertakings required to provide information.

6. (1) Public undertakings shall ensure that information concerning the financial relations referred to in regulation 3 of these regulations shall be kept at the disposal of the Government of Malta for five years from the end of the financial year in which public funds were made available to them. However, where the same funds are used during a later financial year, the five-year limit shall run from the end of that financial year.

(2) Public undertakings shall ensure that information concerning the financial and organisational structure referred to in regulation 5 of these regulations shall be kept at the disposal of the Government of Malta for five years from the end of the financial year to which the information refers.

(3) Wherever the Government of Malta considers it necessary so to request, such public undertakings shall supply to the Ministry responsible for finance the information referred to in sub-regulations (1) and (2) of this regulation, together with any necessary background information, notably the objectives pursued.

Provided, that the financial information as regards public undertakings operating in the manufacturing sector shall be supplied by the public undertakings to the Ministry responsible for finance on an annual basis:

Provided further that such information shall be provided by all public undertakings whose turnover for the most recent financial year was more than Euro 250 million.

(4) The information given in pursuance of this regulation shall be the following:

(a) the annual accounts and annual report in accordance with Council Directive 76/660/EEC. These annual accounts and annual

report shall include the balance sheet and profit and loss account, explanatory notes, together with accounting policies, statements by directors, and segmental and activity reports. Moreover, notice of shareholders' meetings and any other pertinent information shall be provided; and

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

(i) the provision of any share capital or quasi-capital funds similar in nature to equity, specifying the terms of the relative provision (whether ordinary, preference, deferred, or convertible shares, and interest rates, the dividend or conversion rights attaching thereto);

(ii) non-refundable grants, or grants which are only refundable in certain circumstances;

(iii) the award to the undertaking 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 undertaking receiving the loan;

(iv) guarantees given to the undertaking by the Government of Malta in respect of loan finance (specifying terms and any charges paid by the undertaking for these guarantees);

(v) dividends paid out and profits retained;

(vi) Any other form of State intervention, in particular, the forgoing of sums due to the Government of Malta by a public undertaking, including inter alia the repayment of loans, grants, payment of corporate or social taxes or any similar charges.

Time limits to provide information.

7. The information required in regulation 6 of these regulations shall be provided within ten working days from the date of the publication of the annual report of the public undertaking concerned. In any case, specifically for undertakings that do not publish an annual report, the required information shall be submitted not later than six months following the end of such undertaking's financial year.

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