

**THE FINANCIAL TRANSPARENCY  
(EC DIRECTIVE) REGULATIONS  
2009**

Guidance notes

SEPTEMBER 2009

Withdrawn

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# **GUIDANCE NOTES ON THE FINANCIAL TRANSPARENCY (EC DIRECTIVE) REGULATIONS 2009**

## **SECTION 1**

### **INTRODUCTION**

1.1 This guidance is intended to help you to decide:

- Whether your organisation falls within one or more of the categories of undertakings to which the Financial Transparency (EC Directive) Regulations 2009<sup>1</sup> (“the Regulations”) apply.
- Whether the organisation benefits from any of the exemptions from the Regulations.
- If the organisation is not wholly exempted, what obligations the proposed Regulations impose.

1.2 The Regulations implement Commission Directive 2006/111/EC of 16 November 2006<sup>2</sup> on the transparency of financial relations between Member States and public undertakings as well as on transparency within certain undertakings<sup>3</sup> (“the Directive”).

1.3 This guidance has no legal force and is not a substitute for obtaining legal advice. Only the Regulations, as interpreted by the courts, have the force of law.

In case of doubt, contact the State Aid Branch of the Department for Business, Innovation and Skills, 1 Victoria Street, London, SW1H 0ET.

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<sup>1</sup>The Regulations are available at <http://www.opsi.gov.uk/stat.htm>

<sup>2</sup> 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).

## SECTION 2

### CATEGORIES OF UNDERTAKINGS COVERED BY THE REGULATIONS

- 2.1 The Regulations apply to three categories of undertakings. An organisation may fall within **more than one** of these categories.

**Public undertakings**

See paragraphs 2.1 to 2.7.

If your organisation falls within this category, go to paragraphs 3.1 to 3.6.

**Undertakings that are granted an exclusive right or a special right and also carry out other activities OR that are entrusted with a service of general economic interest and receive public service compensation in relation to that service and also carry out other activities.**

See paragraphs 2.1, 2.2, 2.3, and 2.8 to 2.22.

If your organisation falls within this category, go to paragraphs 3.7 to 3.13.

Note: this includes both public and private undertakings.

**Public undertakings operating in the manufacturing sector**

See paragraphs 2.1 to 2.5 and 2.23 to 2.25.

If an organisation falls within this category, go to paragraphs 3.14 to 3.16.

### What is an “undertaking”?

- 2.2 Neither the Regulations nor the Directive define an “undertaking”, however in Community law:

“in the context of competition law....the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed”<sup>4</sup>.

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<sup>4</sup> Hofner and Elser v Macroton GmbH (Case C-41/90)

- 2.3 Economic activity is “any activity consisting in offering goods and services on a given market”<sup>5</sup>. The same entity may engage in both economic activity and non-economic activity; that entity is then an undertaking when, and to the extent that, it is engaging in an economic activity.

### **What is a “public undertaking”?**

- 2.4 Regulation 2 defines a "public undertaking" as:

“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 therein, 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 majority 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”.

**Note:** this is a list of circumstances in which a public authority is presumed to exercise a dominant influence: it does not rule out the possibility that a public authority exercises a dominant influence in other circumstances.

- 2.5 To sum up, an organisation falls within the "public undertaking" category if, and when, it is an entity over which a public authority may exercise, directly or indirectly, a dominant influence and which offers goods or services in a market.

### **What is a public authority?**

- 2.6 Regulation 2 defines a public authority as including the Crown and any regional, local or other territorial authority.

- 2.7 It is possible for some of the activities which an entity undertakes to be those of a public authority (e.g. regulatory in nature), whilst others are economic activities. It is also possible for some of the activities of central and or local government to be economic activities. A body will be an undertaking when, and to the extent that it is, engaging in the economic activity.

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<sup>5</sup> *Aéroport de Paris v Com* (Case C-82/01 P)

## **What is an “exclusive right” or a “special right”?**

2.8 Regulation 2 defines an "exclusive right" as:

“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”.

Possible examples of economic activities for which an exclusive right may be granted include the provision of a passenger rail and or ferry service.

2.9 Regulation 2 defines a "special right" as:

“any right that is granted by a public authority through any legislative, regulatory or administrative means, which, within a geographical area and otherwise than according to 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 or undertakings any legal or regulatory advantages which substantially affect the ability of any other undertakings to operate the same activity in the same geographical area under substantially equivalent conditions”.

## **What are “objective, proportional and non-discriminatory criteria”?**

2.10 The Commission’s Interpretative Communication on concessions under Community law<sup>6</sup> gives an insight into its understanding of the meaning, in particular, of proportional and non-discriminatory criteria.

2.11 The Communication points out that:

“The principle of proportionality is recognised by the established case law of the Court as ‘being part of the general principles of Community law’; it also binds national authorities in the application of Community law, even when they have a large area of discretion.

The principle of proportionality requires that any measure chosen should be both necessary and appropriate in the light of the objectives sought. In choosing the

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<sup>6</sup> OJ C 121 of 29.4.2000 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:121:0002:0013:EN:PDF>

measures to be taken, a Member State must adopt those which cause the least possible disruption to the pursuit of an economic activity”.

2.12 As regards non-discriminatory criteria, the Communication points out that:

“According to the established case law of the Court ‘the general principle of equality of treatment, of which the prohibition of discrimination on grounds of nationality is merely a specific enunciation, is one of the fundamental principles of Community law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified’.

Moreover the Court asserted that the principle of equality of treatment ‘forbids not only overt discrimination by reason of nationality...but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result’.”

2.13 More generally, special rights awarded through a process that accords, *mutatis mutandis*, with the EU procurement rules are likely to be considered to be granted according to objective and non-discriminatory rules.

#### **What is a “service of general economic interest (SGEI)”?**

2.14 The EU Treaty does not define a SGEI – it is for Member States to define, with the Commission and Court only having a role in cases of manifest error. The Commission has identified transport networks, energy and communications (posts, telecommunications, broadcasting) as sectors tending to be regarded, as SGEIs, but SGEIs are by no means limited to these sectors.

2.15 However, broadly speaking the classification as SGEIs normally applies to services:

- the provision of which is generally entrusted to public or private operators rather than being entrusted by statute to all undertakings in a given sector of the economy;
- which are intended to meet the general needs of the populace, notably in the case of public services, and do not benefit a specific category of user.

2.16 It is also clear that an undertaking must have been formally “entrusted” with an SGEI through an act of a public authority (which can be primary or secondary legislation a contract or Ministerial Instruction); a degree of general or specific supervision by a public authority is not sufficient.

2.17 A separate guidance note on the Delivery of Public Services, including a discussion of SGEIs is available from the State Aid Branch of the Department for Business, Innovation and Skills.

### **What is “public service compensation”?**

- 2.17 For the obligations in Regulation 6 (i.e. requirement to maintain separate accounts) to apply to an the undertaking entrusted with an SGEI, that undertaking must, amongst other things, also receive public service compensation in relation to the service. This is to enable the Commission to verify that there has been no over compensation. The Directive will catch all compensation for an SGEI regardless of its aid status. Public service compensation means any financial support that is granted by the State or through state resources to an undertaking entrusted with the operation of a SGEI and is designed to cover costs, some or all of the costs associated with the specific obligations imposed on the undertaking.

### **What is “any other activity”?**

- 2.20. The obligations in Regulation 6 apply to any undertaking that is required to maintain separate accounts, i.e. undertakings that are granted a special/exclusive right or entrusted with an SGEI (for which it receives public service compensation in relation to that service and which is a state aid) and “*also carries on any other activity*” (see Regulation 2). Neither the Regulations nor the Directive define “any other activity”. The obligation to maintain separate accounts applies whether the other activities are economic or not because the purpose of the Directive is to identify the costs and revenues attributable to the SGEI/ special or exclusive right from those of any other activities which the undertaking carries out, whatever their nature, so that (not least) the undertaking’s competitors can know how much public compensation it is receiving for the functions it carries out.

- 2.22 To sum up, an organisation falls within this category if it is an entity that offers goods or services in a market and that either it:

- is granted an exclusive right; or
- is granted a special right otherwise than in accordance with objective, proportional and non-discriminatory criteria; or
- is entrusted with an SGEI and receives public service compensation, regardless of aid status, in relation to that service; and
- also carries out another activity

irrespective of whether it is a public or a private undertaking.

## **What is a "public undertaking operating in the manufacturing sector"?**

- 2.23 Regulation 2 defines a "public undertaking operating in the manufacturing sector" as:

“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”<sup>7</sup>.

- 2.24 Neither the Regulations nor the Directive define “total annual turnover”. However net turnover has been defined elsewhere as:

"comprising the amounts derived from the sale of products and the provision of services falling within the company's ordinary activities, after deduction of sales rebates and of value added tax and other taxes directly linked to the turnover"<sup>8</sup>.

Only turnover from an economic activity need be included in total annual net turnover.

- 2.25 To sum up, an organisation falls within the third category if, and when, it is an entity over which a public authority may exercise, directly or indirectly, a dominant influence and that offers goods or services on a market, and that has at least 50% of its total annual turnover arising from manufacturing operations.

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<sup>7</sup> L293, 24.10.90, p.1, as amended by OJ L 83, 3.4.1993, p.1.

<sup>8</sup> Article 28 of the Fourth Council Directive of 25 July 1978 based on Article 54(g) of the Treaty on the annual accounts of certain types of company, as amended. The Commission published an Interpretive Communication concerning certain Articles of the Fourth and Seventh Council Directives on Accounting (OJ C 16 of 20.1.1998)



## SECTION 3

### EXEMPTIONS FROM THE REGULATIONS

#### A. PUBLIC UNDERTAKINGS

3.1 Regulation 3(5) provides that the obligations imposed by the Regulations on public undertakings do **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:
  - (i) whose total annual net turnover is less than €40 million in each of the two financial years preceding that in which public funds are made available to it, as regards obligations relating to such funds being made available to it; or
  - (ii) whose total annual net turnover is less than €40 million in each of the two financial years preceding that in which public funds are last used by it, as regards obligations relating to such funds being used by it.
- (e) a public credit institution:
  - (i) whose balance sheet total is less than €800 million in each of the two financial years preceding that in which public funds are made available to it, as regards obligations relating to such funds being made available to it; or
  - (ii) whose balance sheet total is less than €800 million at the end of each of the two financial years preceding that in which public funds are last used by it, as regards obligations relating to such funds being used by it.

**Note:** the €40 million/ €800 million threshold may exempt an organisation in some financial years, but not in others. This may make it necessary to check each year whether the Regulations apply. Unless these exemptions take all of the activities of your organisation outside the provisions of the Regulations relating to public undertakings (at least for the current financial year), go to paragraphs 4.1 to 4.3 for the obligations that the Regulations impose on your organisation.

### **What are “public funds”?**

3.2 Neither the Regulations nor the Directive define “public funds”. However Regulation 3(2) provides that:

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

are to be regarded as providing public funds. “Setting-off operating losses” would seem to refer to situations in which a public undertaking is compensated for losses of a general nature (in view of the lack of guidance from the Commission on this point, any problems arising from this issue should be referred to the contact official).

### **What does “affect trade ... to an appreciable extent” mean?**

3.3 Neither the Regulations nor the Directive define “to an appreciable extent”, however Community jurisprudence in the context of State aid suggests that:

“it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that they may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States. Moreover, that effect must not be insignificant”<sup>9</sup>.

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<sup>9</sup> Ambulanz Glockner (Case C-475/99)

In practice, the effect of this exclusion is not as wide as it may seem, as there are very few activities, beyond the purely local, that can be judged not to have some potential effect on intra-community trade.

#### **What is a “public credit institution”?**

- 3.4 Neither the Regulations nor the Directive define a “public credit institution”. However a “credit institution” has long been defined elsewhere<sup>10</sup> as:

“an undertaking whose business is to receive deposits and other repayable funds from the public and to grant credits for its own account”.

Public credit institutions are very popular on the Continent, particularly Germany. However, there are very few, if any, examples of public credit institutions operating in the UK.

#### **What is “total annual net turnover”?**

- 3.5 See paragraph 2.24.

#### **What is “balance sheet total”?**

- 3.6 Neither the Regulations nor the Directive define “balance sheet total”, however “balance sheet total” has been defined elsewhere<sup>11</sup> as comprising unpaid subscribed capital, formation expenses, fixed assets, current assets, and prepayments and accrued income.

### **B. UNDERTAKINGS THAT ARE GRANTED AN EXCLUSIVE RIGHT OR SPECIAL RIGHT OR ARE ENTRUSTED WITH A SERVICE OF GENERAL ECONOMIC INTEREST**

- 3.7 Regulation 6(3) provides that the obligations imposed by the Regulations on undertakings that are granted an exclusive right or special right or are entrusted with an SGEI do not apply to:
- (a) activities in respect of which other provisions in relation to financial transparency within undertakings have been laid down by the Communities.
  - (b) services supplied by an undertaking that are not liable to affect trade between Member States to an appreciable extent.

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<sup>10</sup> The definition is currently contained in Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ L 126 of 26.5.2001).

<sup>11</sup> Article 12, read with Articles 9 and 10, of the Fourth Council Directive of 25 July 1978 based on Article 54(g) of the Treaty on the annual accounts of certain types of company, as amended.

- (c) an undertaking, other than a public credit institution:
  - (i) whose total annual net turnover is less than €40 million in each of the two financial years preceding that in which public funds are made available to it, as regards obligations relating to such funds being made available to it; or
  - (ii) whose total annual net turnover is less than €40 million in each of the two financial years preceding that in which public funds are last used by it, as regards obligations relating to such funds being used by it.
- (d) a public credit institution:
  - (i) whose balance sheet total is less than €800 million at the end of each of the two financial years preceding that in which public funds are made available to it, as regards obligations relating to such funds being made available to it; or
  - (ii) whose balance sheet total is less than €800 million at the end of each of the two financial years preceding that in which public funds are last used by it, as regards obligations relating to such funds being used by it.
- (e) an undertaking which is entrusted with the operation of a SGEI pursuant to Article 86(2) of the Treaty if the compensation it receives was fixed following an open, transparent and non-discriminatory procedure.

**Note:** An organisation may be exempted by the €40 million/ €800 million threshold in some financial years, but not in others. This may make it necessary to check each year to assess whether the Regulations apply. Unless these exemptions take all of the activities of your organisation outside the provisions of the Regulations relating to undertakings that are granted an exclusive right or a special right or are entrusted with an SGEI (at least for the current financial year), go to paragraphs 4.4 to 4.8 for the obligations that the Regulations impose on your organisation.

**What are the "activities in respect of which other provisions in relation to financial transparency within undertakings have been laid down by the Communities"?**

- 3.8 Neither the Regulations nor the Directive specify the "activities in respect of which other provisions in relation to financial transparency within undertakings have been laid down by the Communities". Examples include rail, road and inland waterway transport; the supply of electricity; ground-handling activities at airports and the supply of natural gas<sup>12</sup>.

<sup>12</sup> Council Regulation (EEC) No 1893/91 of 20 June 1991 amending Regulation (EEC) No 1191/69 on action by Member States concerning the obligations inherent in the concept of a public service

**What does “affect trade ... to an appreciable extent” mean?**

3.9 See paragraph 3.3<sup>13</sup>.

**What is “total annual net turnover”?**

3.10 See paragraph 2.24.

**What are “public funds”?**

3.11 See paragraph 3.2.

**What is a “public credit institution”?**

3.12 See paragraph 3.4.

**What is “balance sheet total”?**

3.13 See paragraph 3.6.

## **C. PUBLIC UNDERTAKINGS OPERATING IN THE MANUFACTURING SECTOR**

3.14 Regulation 9(6) provides that the obligations imposed by the Regulations do not apply to public undertakings in the manufacturing sector with a turnover in the previous financial year of €250 million or less.

3.15 Unless this exemption takes your organisation outside the provisions of the Regulations relating to public undertakings in the manufacturing sector, go to paragraphs 4.9 to 4.13 for the obligations that the Regulations impose on your organisation.

3.16 Neither the Regulations nor the Directive define "turnover". However “net turnover” has been defined elsewhere (see paragraph 2.24).

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in transport by rail, road and inland waterway (OJ L 169 of 29.6.1991); Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ L 237 of 24.8.1991); Council Directive 96/67/EC of 15 October 1996 on access to the ground-handling market at Community airports (OJ L 272 of 25.10.1996); Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ L 27 of 30.1.1997); and Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas (OJ L 204 of 21.7.1998).

<sup>13</sup> Ambulanz Glockner (Case C-475/99)

## SECTION 4

### OBLIGATIONS

#### A. PUBLIC UNDERTAKINGS

4.1 A public undertaking to which the Regulations apply must:

- (a) maintain records of any public funds which are made available to it either (i) directly by a public authority, or (ii) by a public authority through another public undertaking or financial institution. (Regulation 3(1))
- (b) maintain a record of the use to which any public funds made available to it are put. (Regulation 3(4))
- (c) retain the records of any public funds made available to it for a period of five years starting on the last day of (i) the financial year in which those funds were made available or (ii) the financial year in which those funds were last put to use, whichever is the later; (Regulation 4(1))
- (d) retain the record of the use to which any public funds made available to it were put for a period of five years starting on the last day of the financial year in which those funds were last put to use. (Regulation 4(2))
- (e) within 28 days of receipt of a written request by the Secretary of State, provide the Secretary of State with (i) the information requested concerning those records, (ii) copies of those records, if so requested, and (iii) such further information as the Secretary of State considers necessary to fulfil the United Kingdom's obligations under the Directive. (Regulation 5)

**Note:** It may be that in a particular financial year, public funds are made available to your organisation or your organisation puts to use public funds that have been made available to it, but not both in the same financial year. In that event, sub-paragraph (a) above or sub-paragraph (b) above will apply, as appropriate.

#### **What are “public funds”?**

4.2 See paragraph 3.2.

#### **What does “to fulfil the United Kingdom’s obligations under the Directive” mean?**

4.3 Article 5.3 of the Directive requires Member States, where the Commission considers it necessary so to request, to supply to it not only information concerning the records that public undertakings must maintain and retain but also “any necessary background information, notably the objectives pursued”.

## **B. UNDERTAKINGS THAT ARE GRANTED AN EXCLUSIVE RIGHT OR A SPECIAL RIGHT OR ARE ENTRUSTED WITH A SERVICE OF GENERAL ECONOMIC INTEREST**

- 4.4 An undertaking (i) that is granted an exclusive right or a special right and which carries out another activity or (ii) that is entrusted with an SGEI, receives public service compensation in relation to that service and carries out another activity, being an undertaking to which the Regulations apply, must:
- (a) maintain separate accounts for its activities under the exclusive or special right or SGEI and for its other activities. Those separate accounts must (i) show the respective costs and revenues associated with the different activities, (ii) show the methods by which costs and revenues are assigned to the different activities, and (iii) be based on clearly established, consistently applied and objectively justifiable cost accounting principles. (Regulation 6(1) to 6(2))
  - (b) retain those separate accounts for a period of five years starting on the last day of the financial year to which those accounts relate. (Regulation 7)
  - (c) within 28 days of receipt of a written request by the Secretary of State, provide the Secretary of State with (i) the information requested concerning those separate accounts, (ii) copies of those separate accounts, if so requested, and (iii) such further information as the Secretary of State considers necessary to fulfil the United Kingdom's obligations under the Directive and requests. (Regulation 8)

### **What are “separate accounts”?**

- 4.5. Neither the Regulations nor the Directive define “separate accounts”. However, in another context<sup>14</sup> “separate accounts” have been held to involve the adoption of “an accounting system with separate accounts designed to allow...in particular, verification that there are neither cross subsidies between reserved and non-reserved services, nor discriminatory practices”. The Regulations require the maintenance and retention of records: they do not require the preparation or publication of the separate accounts, though this may represent good practice or be required by other legislation.

### **What does “to fulfil the United Kingdom’s obligations under the Directive,” mean?**

- 4.8 See paragraph 4.3.

## **C. PUBLIC UNDERTAKINGS OPERATING IN THE MANUFACTURING SECTOR**

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<sup>14</sup> TNT Traco Spa (Case C-340/99)

4.9 A public undertaking operating in the manufacturing sector with a turnover in the previous financial year of more than €250 million must provide to the Secretary of State:

- (a) a copy of its annual report and accounts;
- (b) a copy of any notices of shareholder meetings relating to that financial year;
- (c) specified information insofar as it is not included in the annual report and annual accounts;

within 10 working days of the publication (if any) of the annual report or eight months following the end of the undertaking's financial year, whichever is the earlier. (Regulation 9)

4.10 A public undertaking operating in the manufacturing sector with a turnover in the previous financial year of more than €250 million must, within 28 days of a written request by the Secretary of State, provide the Secretary of State with such further information as the Secretary of State requests and considers necessary to fulfil the United Kingdom's obligations under the Directive. (Regulation 9(5))

4.11 In some circumstances information may be provided in consolidated form. (Regulation 10)

4.12 These obligations are complex: their detailed application is best-addressed case by case, in consultation with State Aid Branch, as the need arises.

**What does “to fulfil the United Kingdom’s obligations under the Directive” mean?**

4.13 See paragraph 4.3.

## **SECTION 5**

### **CONTRACT TERMS**

5.1 Public authorities shall ensure that the elements of the appropriate Regulations are contained as terms in contracts covered by the Regulations.

5.2 Irrespective of the requirement set out in paragraph 5.1, in any contract between a public authority and a public undertaking covered by the Regulations, the elements of the appropriate Regulations will be included as implied terms in those contracts. If a public undertaking fails to comply with those implied terms they will be liable for breach of contract.



Withdrawn