

**THIRD SUPPLEMENT TO THE GIBRALTAR  
GAZETTE**

**No. 3,746 of 1st December, 2009**

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**B. 40/09**

**BILL**

**FOR**

**AN ACT** to amend the Public Finance (Control and Audit) Act in order to transpose into the law of Gibraltar 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, and matters connected thereto.

**ENACTED** by the Legislature of Gibraltar.

**Title and commencement.**

1. This Act may be cited as the Public Finance (Control and Audit) (Amendment) Act 2009 and shall be deemed to have come into operation on 1 December 2009.

**Amendment of the Public Finance (Control and Audit) Act.**

2. The Public Finance (Control and Audit) Act is amended by inserting after Part XI, the following Part—

**“PART XII**

**FINANCIAL RELATIONS BETWEEN THE GOVERNMENT  
AND PUBLIC UNDERTAKINGS**

**Interpretation of Part.**

76.(1) In this Part and unless the context otherwise requires—

“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;

“exclusive rights” means rights that are granted by the Government to one undertaking in Gibraltar through any legislative, regulatory or administrative instrument, reserving it the right to provide a service or undertake an activity within Gibraltar;

“public authorities” means all public authorities;

“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;

“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, as published in the Official Journal of the European Communities with the following reference, OJ L 83, 3.4.1993, p. 1;

“special rights” means rights that are granted by Gibraltar law or by the Government 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;

- (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 in Gibraltar under substantially equivalent conditions;

“undertaking required to maintain separate accounts” means any undertaking that enjoys a special or exclusive right granted in Gibraltar pursuant to Article 106(1) of the Treaty or is entrusted with the operation of a service of general economic interest pursuant to Article 106(2) of the Treaty, that receives public service compensation in any form whatsoever in relation to such service and that carries on other activities;

- (2) For the purposes of the definition of “public undertakings” in subsection (1), a dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly in relation to an undertaking–
  - (a) hold the major part of the undertaking’s subscribed capital;
  - (b) control the majority of the votes attaching to shares issued by the undertakings; or
  - (c) can appoint more than half of the members of the undertaking’s administrative, managerial or supervisory body.

**Transparency of financial relations.**

77.(1) The Financial Secretary shall take steps to ensure that financial relations between public authorities and public undertakings as defined in section 76 are transparent as provided in this Part, so that the following details emerge clearly, that is to say–

- (a) the public funds made available directly by public authorities to the public undertakings concerned;
  - (b) the public funds made available by public authorities through the intermediary of public undertakings or financial institutions; and
  - (c) the use to which these public funds are actually put.
- (2) The Financial Secretary shall ensure that the financial and organisational structure of any undertaking required under any statutory provision to maintain separate accounts is correctly reflected in the separate accounts, so that the following emerge clearly, that is to say—
- (a) the costs and revenues associated with different activities; and
  - (b) full details of the methods by which costs and revenues are assigned or allocated to different activities.

**Application of section 77.**

78. The transparency referred to in section 77(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; and

- (f) compensation for financial burdens imposed by the public authorities.

**Maintenance of separate accounts.**

79.(1) To ensure the transparency referred to in section 77(2), the Financial Secretary shall 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; and
- (c) the cost accounting principles according to which separate accounts are maintained are clearly established.

(2) Subsection (1) shall only apply to activities which are not otherwise covered by specific provisions laid down by the Union and shall not affect any obligations of the Government or undertakings arising from the Treaty or from such specific provisions.

**Exemptions.**

80.(1) As far as the transparency referred to in section 77(1) is concerned, this Part 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 Gibraltar and Member States to an appreciable extent;
- (b) the Gibraltar Savings Bank;

- (c) any public credit institutions, as regards deposits of public funds placed with them by public authorities on normal commercial terms; and
  - (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 section 77(1) are made available or used has been less than EUR 40 million; save that in respect of the Gibraltar Savings Bank and any other public credit institution, the corresponding threshold shall be a balance sheet total of EUR 800 million.
- (2) As far as the transparency referred to in section 77(2) is concerned, this Part shall not apply–
- (a) to undertakings, as regards services the supply of which is not liable to affect trade between Gibraltar and 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–
    - (i) it enjoys a special or exclusive right granted in Gibraltar pursuant to Article 106(1) of the Treaty; or
    - (ii) it is entrusted with the operation of a service of general economic interest pursuant to Article 106(2) of the Treaty,is less than EUR 40 million; save that in respect of the Gibraltar Savings Bank and any other public credit institution, the corresponding threshold shall be a balance sheet total of EUR 800 million; and
  - (c) to undertakings which have been entrusted with the operation of services of general economic interest pursuant to Article 106(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.

**Supply of information to the European Commission concerning the information referred to in section 77.**

- 81.(1) Information concerning the financial relations referred to in section 77(1) shall be kept by the Financial Secretary at the disposal of the European Commission for five years from the end of the financial year in which the public funds were made available to the public undertakings concerned; 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) Information concerning the financial and organisational structure of undertakings referred to in section 77(2) shall be kept by the Financial Secretary at the disposal of the European Commission for five years from the end of the financial year to which the information refers.
- (3) The Financial Secretary shall, where the European Commission considers it necessary so to request, ensure the supply to the European Commission of the information referred to in subsections (1) and (2), together with any necessary background information, notably the objectives pursued.

**Public undertakings in the manufacturing sector.**

- 82.(1) The Financial Secretary shall ensure that, in relation to public undertakings operating in the manufacturing sector, the European Commission is supplied with the financial information set out in subsections (2) to (4) on an annual basis and within the timetable contained in subsection (8).
- (2) The financial information required for each public undertaking operating in the manufacturing sector, and in accordance with subsection (5), shall be as follows—
- (a) the annual report and annual accounts, in accordance with the provision of the Companies (Accounts) Act 1999 and the Companies (Consolidated Accounts)

Act, including the balance sheet and profit/loss account, explanatory notes, together with accounting policies, statements by directors, segmental and activity reports; and

- (b) notices of shareholders' meetings and any other pertinent information.
- (3) The reports required under subsection (2) shall be provided for each individual public undertaking separately, as well as for the holding or sub holding company which consolidates several public undertakings in so far as the consolidated sales of the holding or sub holding company lead to its being classified as "manufacturing".
- (4) 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 subsections (2) and (3)–
- (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 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;
  - (d) guarantees given to the undertaking by public authorities in respect of loan finance (specifying terms and any charges paid by undertaking for these guarantees);
  - (e) dividends paid out and profits retained; and

- (f) any other forms of intervention by the Government, in particular, the forgoing of sums due to the Government 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 paragraph (a) shall include share capital contributed by the Government 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.

- (5) The information required by subsections (2) to (4) shall be provided only in respect of public undertakings whose turnover for the most recent financial year was more than EUR 250 million.
- (6) The information required by subsections (2) to (4) shall be supplied separately for each public undertaking including those located in 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 Government.
- (7) Where public undertakings split their activities into several legally distinct undertakings, one consolidated report may be submitted, reflecting the economic reality of a group of undertakings operating in the same or closely related sectors. Consolidated reports from diverse, and purely financial, holdings shall not be sufficient for the purposes of this section.
- (8) The information required under subsections (2) to (4)–
  - (a) shall be supplied to the European Commission on an annual basis; and

- (b) shall be provided within 15 working days of the date of publication of the annual report of the public undertaking concerned,

provided that, 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.

- (9) In order to assess the number of companies covered by this reporting system, the Financial Secretary shall ensure that the European Commission is supplied with a list of the companies covered by this section and their turnover. The list is to be updated by 31 March of each year.
- (10) The Financial Secretary shall ensure that the European Commission is furnished with any additional information that it deems necessary in order to complete a thorough appraisal of the data submitted.”.

#### **EXPLANATORY MEMORANDUM**

This Bill inserts a new Part XII into the Public Finance (Control and Audit) Act in order to transpose into the law of Gibraltar 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.

Pursuant to new Part XII, the Financial Secretary must ensure the transparency of financial relations between public authorities and public undertakings so that public funds made available to public undertakings by public authorities directly or indirectly (through public undertakings or financial institutions) are disclosed and their effective use is made clear.

The transparency of financial relations must be ensured in particular in respect of—

- (a) the setting-off of operating losses;
- (b) the forgoing of a normal return on public funds used;

- (c) the provision of capital;
- (d) non-refundable grants or loans on privileged terms;
- (e) the granting of financial advantages by forgoing profits or the recovery of sums due;
- (f) compensation for financial burdens imposed by the public authorities.

Under the Bill, the Financial Secretary must ensure that information concerning financial relations between public undertakings and public authorities remains available to the European Commission for five years and is forwarded to the European Commission at its request.

**Obligation on certain undertakings to keep separate accounts.**

Under the Bill, separate accounts must be kept by public and private undertakings which have been granted special or exclusive rights in Gibraltar or which are responsible for operating a service of general economic interest and which receive public service compensation in any form whatsoever in relation to such service and at the same time perform other activities.

These separate accounts must reflect the different activities performed by the undertaking, showing the costs and revenues associated with each activity and the methods of cost and revenue assignment and allocation.

The Financial Secretary must ensure that information regarding the financial and organisational structures of the undertakings concerned remains available to the European Commission for five years and is forwarded to the European Commission at its request.

**Manufacturing.**

Specific provisions apply to public undertakings operating in the manufacturing sector where their annual turnover exceeds EUR 250 million.

The Financial Secretary must provide, on an annual basis and for all undertakings concerned, the annual reports, annual accounts, notices of shareholders' meetings and any other relevant information. The Financial

Secretary must also provide the European Commission with a list of the companies concerned by 31 March of each year.

**Conditions for exemption.**

A number of exemptions apply, notably in relation to annual turnover figures and to undertakings supplying services which are unlikely to affect trade between Gibraltar and Member States to an appreciable extent.