

Case 118/85

Commission of the European Communities

v

Italian Republic

(Transparency of financial relations between
Member States and public undertakings)

Report for the Hearing	2600
Opinion of Mr Advocate General Mischo delivered on 4 November 1986	2609
Judgment of the Court, 16 June 1987	2619

Summary of the Judgment

Competition — Public undertakings — Transparency of financial relations between Member States and public undertakings — Distinction between the role of the State as public authority and as a producer or as a provider of services — Body integrated into the administration of the State — Designation as public undertaking — Lack of legal personality distinct from that of the State — No effect

(Commission Directive 80/723, Art. 2)

The distinction between 'public authorities' and 'public undertakings' provided for in Article 2 of Directive 80/723 on the transparency of financial relations between Member States and public undertakings flows from the recognition of the fact that the State may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services on the market. In order to make such a distinction, it is therefore necessary, in each case, to

consider the activities exercised by the State and to determine the category to which those activities belong.

The State may carry out the said activities through a separate body over which it may exercise the dominant influence required by Article 2 of the directive or carry out those activities directly through a body forming part of the State administration. The fact that a body has or has not, under national

law, legal personality distinct from that of the State is irrelevant in deciding whether it may be regarded as a public undertaking within the meaning of Directive 80/723, because, on the one hand, the purpose of that directive would be called in question if its application depended on whether or not

State bodies had legal personality distinct from that of the State, and, on the other, the absence of legal personality distinct from that of the State does not prevent the existence of financial relations between the State and those of its bodies which carry out economic activities.

REPORT FOR THE HEARING delivered in Case 118/85 *

I — Facts and procedure

Commission Directive No 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (Official Journal 1980, L 195, p. 35), which was adopted pursuant to Article 90 (3) of the EEC Treaty, in particular seeks to achieve transparency in the financial relations between Member States and public undertakings. To that end Article 1 of the directive defines transparency as meaning the clear disclosure of (a) the resources made available to public undertakings, either directly or (*inter alia*) through the intermediary of other public undertakings, and (b) the use to which those funds are actually put. For the purposes of applying the directive, Article 2 states that 'public authorities' means the State and regional or local authorities, and that '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. A dominant influence on the part of the public authorities is to be

presumed when those authorities, directly or indirectly, hold the major part of the undertaking's subscribed capital, control the majority of the votes attaching to shares issued by the undertaking, or can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body. Article 5 requires Member States to keep information concerning those financial matters at the disposal of the Commission for five years and to supply it to the Commission at its request.

By letters of 22 December 1982 and 19 April 1983 the Commission asked the Italian Republic for information on financial relations with public undertakings in the sectors of motor-car manufacture, ship-building, synthetic fibres, textile machinery and manufactured tobacco. Whereas in all the other sectors the Italian Government supplied a certain amount of information, in the case of manufactured tobacco the Italian Government announced in a letter of 15 November 1983 from the office of the Italian Permanent Representative to the European Communities that it did not consider itself bound to supply the annual

* Language of the Case: Italian.