



FCS/83/233

N. S. J. R.

LORD CHANCELLOR

A. J. C. - 15/11.

Commercialisation of the Gibraltar Dockyard

1. I am very sorry not to have been able to reply earlier to your letter of 25 July, commenting on my minute of 15 July to Michael Heseltine on whether or not we should notify to the European Commission the aid we propose to grant to Gibraltar. Since you wrote, I have now also seen the Attorney General's advice in his minute to me dated 7 September, for which I was grateful.

2. I note your reluctance and that of the Attorney General to go along with the idea that we might have to proceed with this aid even in the face of an adverse judgement of the European Court. The risk of the matter ever reaching the Court is, as I said in my minute of 15 July, remote in the extreme. Moreover, recent developments - to which I return below - have served to reduce the risk still further. In any case, I continue to believe that, if the worst nonetheless came to the worst, it would be politically impossible for us to terminate assistance to the Gibraltar dockyard if this risked the effective extinction of the colony's economic future. I accept the force of the broader arguments of principle which you invoke and which point in the opposite direction, but see no need to argue the matter to a finish now.

3. My officials have been giving careful consideration to the other points which you and the Attorney General have raised. But in the meantime, events have moved on in Brussels. The Commission have told us informally that they have received a complaint from the Shipbuilders and Shiprepairers Independent association (SSIA) and that Commissioner Andriessen replied to this on 8 September asserting that:

/(a)



- (a) the measures do not fall within the scope of the Fifth Shipbuilding Directive and are therefore not subject to the notification and scrutiny procedures provided for under its terms;
- (b) the assistance is in any case covered by Article 223 of the Treaty of Rome.

The Commission's arguments are of course not entirely watertight (indeed they appear based in part on the mistaken belief that the funds involved come from the Ministry of Defence) and it is just possible that they might reverse their position if they came under great pressure. But this is nevertheless a very helpful development, which I believe makes it clear both that the judgement on grounds of policy not to notify this aid was right, and that we should not notify it now. Had we notified, we can be sure that the Commission would not have taken such a helpful line with the SSIA. The Commission have evidently chosen to treat our earlier informal contact with them as precisely the kind of notice of our intention not to notify which you recommended in your letter, and have on this basis decided - as we hoped - not to pick a fight with us if they can possibly avoid one. If we were to notify now, they would see this change of course as putting them in a very embarrassing position; their interpretation of Community law would be undercut and they would be made to look foolish. They would probably feel bound, in circumstances in which they had wrongly advised an outside complainant, to process the notification with some rigour. In short, notification in the light of what we now know could precipitate major and quite unnecessary difficulties.

4. I have carefully weighed up the risks that the PAC could criticise or challenge the legitimacy of providing aid money to the Gibraltar Government without it having been formally notified. That risk seems to me to have been considerably reduced, now that the Commission have taken the view that the aid is not notifiable. There is a range of arguments which



could be deployed to justify non-notification and the specific one which you suggest is a helpful addition (although I note the Attorney General's view to the contrary). We might in the last resort have to draw a distinction (though not a very comfortable one) between the disbursement of aid without Commission clearance and the legitimate transfer of money to the Gibraltar Government by HMG - the use of the money by the Gibraltar Government thereafter falling outside the PAC's purview. In general, I find it difficult to conceive of circumstances in which we would be exposed to PAC criticism and do not think that we should let this deflect us from the course of action which in all other aspects makes excellent sense.

5. The Attorney General warns of a number of other undesirable legal consequences which might result if either the Commission were forced to look into the matter more closely or an aggrieved party took action independently. We have always recognised that there are risks inherent in whatever course of action we adopt. But I remain convinced that the best prospect of avoiding trouble lies in the strategy proposed in my minute of 15 July.

6. Our first task must be to help the Commission stick to their guns. The SSIA's detailed reply has exposed the weaknesses of the argumentation in Andriessen's letter of 8 September, and the Commission have hinted that they would welcome informal advice from us on how to reply. I therefore propose to ask my officials, together with officials and experts from other departments concerned, to consider what arguments we could usefully convey to the Commission to help them deal with the SSIA enquiry and close their files on the whole matter.

/7. I am



7. I am copying this minute to the Prime Minister, other members of OD, Timothy Raison, the Attorney General and Sir Robert Armstrong.

A handwritten signature in dark ink, appearing to be 'G. Howe', written in a cursive style.

GEOFFREY HOWE

Foreign and Commonwealth Office
15 November 1983



HOUSE OF LORDS,
SW1A 0PW

21 November 1983

Our Ref: EI38/18/3

The Right Honourable
Sir Geoffrey Howe QC, MP
Principal Secretary of State
for Foreign & Commonwealth Affairs
Foreign & Commonwealth Office
London S.W.1

*nbpm
DMS
2/11*

My dear Geoffrey,

Commercialisation of the Gibraltar Dockyard

Thank you for your minute of 15th November setting out the position with regard to state aids to the Gibraltar Dockyard.

As you know, the matter which has always concerned me most has been the possibility that, if the matter did eventually get to the European Court and resulted in an adverse judgment, you might feel that we should act in defiance of that judgment. You now state in paragraph 2 that the risk of the matter ever reaching the Court is remote in the extreme, and that you see no need to argue the matter to a finish now. I certainly do not wish to labour the point, but I hope that if your optimism turns out to be unjustified, and the matter does reach the European Court, you will keep me informed, because this is a question to which we would then have to return.

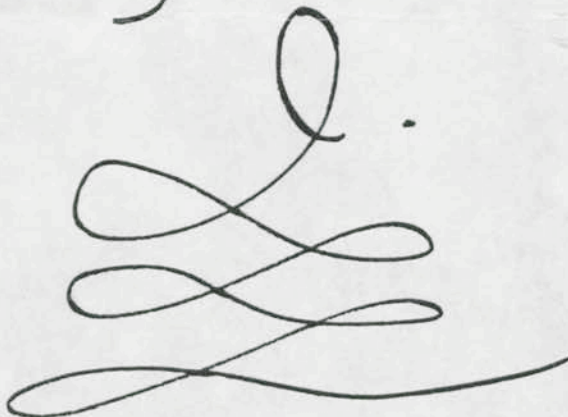
The remainder of your minute is concerned with the tactical question of notification of the aid under Article 93 of the EEC Treaty. As you know, this is a matter in which I have always disclaimed any particular expertise. The arguments which I put forward in my letter to you of 25th July I described as plausible, but I recognised at the

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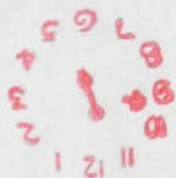
same time that strong arguments could be mounted the other way. Since these arguments were addressed to the possibility of the case reaching the European Court there is no point in my attempting to expand on them now. The most that I can usefully say is that the course advocated in your minute seems to me to be sensible, but that on such a technical matter I would defer to the views of our colleagues who have more experience of state aids.

I am copying this letter to the recipients of your minute.

yours:

A handwritten signature in black ink, consisting of a large, stylized initial 'L' followed by a series of loops and a long horizontal stroke at the bottom.

Subrattar : Policy towards Pt 2



21 NOV 1983



A.S.C. N.

N. B. P. N.

SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

W. 9/9

COMMERCIALISATION OF GIBRALTAR DOCKYARD

I heard that the Lord Chancellor had expressed views on the law on your minute of 15 July to the Secretary of State for Defence. At my Department's request, I have now been provided with a copy of his letter to you of 25 July which was not copied to me. In that letter the Lord Chancellor suggests that it can be argued with some force that aid to the Gibraltar dockyard is not incompatible with the Common Market, is not contrary to Article 92 and does not have to be notified to the Commission under Article 93.

I do not share the Lord Chancellor's view that there is a good argument that the Treaty provisions on state aid do not apply to Gibraltar. I cannot accept that, given the terms of the Act of Accession, it follows that because Gibraltar is outside the customs territory of the Community the competition provisions do not apply. The Lord Chancellor's advice certainly runs counter to previous studies made by officials of the extent to which the Treaty provisions apply to Gibraltar.

As I indicated in my earlier advice, a copy of which is attached to this minute, I have not been able to reach a view on the material available to me as to whether there are sound legal arguments for not notifying the Commission. My first reaction was certainly that there were not but I would need further amplification of the paper attached to your minute of 15 July to the Secretary of State for Defence if a considered view were required.

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I am copying this minute to the Prime Minister, other members of OD, Timothy Raison and Sir Robert Armstrong.

MT

LAW OFFICERS' DEPARTMENT

7 September 1983

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01 57641 Ext. 3020

Communications on this subject should
be addressed to
THE LEGAL SECRETARY
ATTORNEY GENERAL'S CHAMBERS

ATTORNEY GENERAL'S CHAMBERS,
LAW OFFICERS' DEPARTMENT,
ROYAL COURTS OF JUSTICE,
LONDON, W.C.2.

Our Ref: 400/83/187(1of2)

8 August 1983

Private Secretary to the
Secretary of State for Foreign and
Commonwealth Affairs
Foreign and Commonwealth Office
London SW1

Dr
9/8

COMMERCIALISATION OF GIBRALTAR DOCKYARD

I have seen the letter of 25 July from the Lord Chancellor to your Secretary of State.

Unfortunately, neither Law Officer will be available until the end of this month, but I suspect that they will wish to express a view on the argument set out on pages 2 and 3 of the Lord Chancellor's letter.

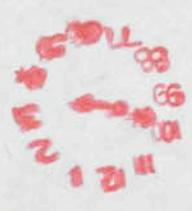
I understand that your Secretary of State himself intends to reply to the letter but is not likely to do so until next month. I also understand that Ministers are not likely to take any decisions relying on the strength of the various legal arguments until then.

I am copying this to the Private Secretaries to the Prime Minister, the Lord Chancellor, other members of OD, the Minister for Overseas Development and Sir Robert Armstrong, and also to Richards in your ECD(E), Alan Preston in the Treasury Solicitor's Department and Julian Mackenney in the Cabinet Office.

A M SUSMAN

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19 AUG 1983