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Qz.03597

MR COLES

DEFENCE AND OVERSEA POLICY COMMITTEE, 22 FEBRUARY

--- I attach briefing for the Prime Minister on item 2
(European Community budget: contingency plans for withholding).
For this item the Secretary of State for Northern Ireland, the
Attorney General, the Lord Advocate and Minister of State, Ministry
of Agriculture, Fisheries and Food (Mr MacGregor) are also
invited. The Secretary of State for Trade and Industry will be
represented by the Minister of State (Mr Lamont). The Secretary
of State for Defence and the Chancellor of the Duchy of Lancaster
will not be present.

I am sending a copy to Sir Robert Armstrong.

D F WILLIAMSON

17 February 1984

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DEFENCE AND OVERSEA POLICY COMMITTEE: ¹⁶⁰⁰~~4.45pm~~ WEDNESDAY
22 FEBRUARY 1984

BRIEF FOR THE CHAIRMAN

- FLAG A Item 2: EC Budget: Withholding Contingency Plans (OD(84) 2)
Also relevant are -
- FLAG B EC Budget: Relationship between Payment of the United Kingdom's 1982 and 1983 Refunds and the post-Stuttgart Negotiations (OD(84) 3)
and
- FLAG C EC Budget Contingency Plans: Draft White Paper (OD(84) 4)

Purpose

1. To take forward contingency planning in case the Government should decide to withhold Community funds after the European Council on 19-20 March. The Committee is invited to take provisional decisions on a number of issues (summarized in para 2 of OD(84) 2) and to decide in principle whether, in the event of a decision to withhold Community funds, the Government should simultaneously publish a White Paper.

Background

2. The main paper is OD(84) 2. This is a note by the Secretaries to which is annexed a Treasury paper on the practical questions which would arise in the event of a decision to withhold Community funds. The Treasury paper is a revised version of that circulated to (but not discussed by) OD last summer (OD(83) 9). It has been extensively discussed and broadly agreed between Departments at official level.

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3. There are two other papers:-

OD(84) 3 to which is attached a background paper by officials. This is not intended for discussion. Its purpose is to explain to those members of the Committee who have not been closely involved in the negotiations on the Community budget, what those negotiations are and how the different aspects inter-relate; and

OD(84) 4 to which is attached a draft White Paper. The draft is an updated version of that circulated to (but not discussed by) OD last summer (OD(83) 8). It has been extensively discussed and broadly agreed between Departments at official level. The Committee is invited (para 2) to decide in principle to publish a White Paper in the event of a decision to withhold, and in that case to invite the secretaries to submit a revised and updated draft for approval at the time.

FLAG E

Questions for decision (OD(84) 2)

4. The Government will not wish to take the major decision, even in principle, whether or not to withhold Community funds until after the European Council on 19-20 March and until it is clear whether the United Kingdom will receive the bulk of its 1983 refunds by 31 March 1984. Such a decision would be of major constitutional and political importance, requiring the agreement of the full Cabinet. The Law Officers have advised that it would be unlawful in Community and United Kingdom law. It would significantly affect our relations with other member states and within the Community as a whole. A number of technical and operational questions, however, need to be resolved before the Government would be in a position to withhold. These are listed in paragraphs 2 and 3 of OD(84) 2. It would considerably ease the contingency planning if the Committee could now take provisional decisions on the points in paragraph 2 of OD(84) 2, while noting the remaining major points in paragraph 3. These latter points (the extent of withholding and its public presentation and whether to legislate at the time of withholding or later), although not presented for immediate decision by the Committee, may still give rise to some discussion at the meeting.

5. The issues for decision, on a contingency basis, now are -

(i) whether to limit withholding to payments out of the Commission's account or to limit payments in as well. The Treasury recommendation is that initially the Government should only limit payments out, but should hold in reserve the possibility of restricting payments in. The arguments are set out in paragraphs 6 and 7 of the Treasury paper. There are strong presentational arguments for restricting payments out only, but it may be necessary later to restrict payments in as well to meet agreed objectives on the extent of withholding. Paragraph 9 explains the arguments against opening a special suspense account.

(ii) content of the legislation. The draft Bill at Annex C to the Treasury paper provides that:-

- (a) the Treasury's consent shall be required for any payments into or out of the Commission's account held with the Paymaster General;
- (b) with certain exceptions, United Kingdom courts shall not entertain proceedings to declare or enforce Community obligations the implementation of which could be prevented under (a) above;
- (c) these provisions shall have effect notwithstanding anything in the European Communities Act, 1972, and
- (d) in the event of retaliation by the Community, the Government can, in substitution for the Commission, make payments to normal recipients of Community funds in the United Kingdom.

One particular point for decision is whether the Bill should provide for retaliation ((d) above) or whether, if necessary, a second Bill should be introduced later to deal with retaliation. The arguments are set out in paragraphs 31 and 32 of the Treasury paper. Officials are agreed that the balance of argument favours a single comprehensive Bill.

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On Ministerial responsibility for the legislation, the Treasury suggest (para 33) that the main responsibility would fall on a Foreign Office or a Treasury Minister; but the Law Officers and possibly other Ministers might also need to be involved.

Paragraphs 34 and 35 suggest that if the Government does decide to legislate at the outset, it would be important for both legal and administrative reasons that the Bill should pass rapidly; if possible, within a week, while withholding by administrative delay in the interval. The agreement or the acquiescence of the Opposition will be necessary.

(iii) The UK should defend itself before the European Court. Researches and consultations with Counsel last year have served to confirm the Law Officers' view that our defence to proceedings before the European Court for breaches by the United Kingdom of Community law by withholding, would be very weak. The Treasury paper (para 38) suggests, therefore, that while we should argue our case strongly both technically in law and in mitigation, we should not attempt to sue the Commission, the Council or the European Parliament under the Treaty.

(iv) Retaliation. Paragraphs 39-45 of the Treasury paper discuss the likely extent and effect of possible retaliation, recommend that the United Kingdom should make every effort to dissuade the Community from retaliating, particularly against United Kingdom recipients of Community funds, and recommend that the Government should be in a position to take over the Commission's role in the event of retaliation. The draft bill provides for this. Paragraph 45 suggests some broad objectives for the Government in dealing with retaliation. There is likely to be broad agreement on these objectives.

Even so, it is difficult to predict the likelihood or the scope of the retaliation and thus to decide now how to deal with it. Departments have, however, prepared contingency plans. A number of important decisions will need to be

made in the event of retaliation. The Treasury paper (para 47) identifies two main financial options. Paragraph 50 suggests that Ministers would need to decide between them at the time.

6. The issues listed for later decision in paragraph 3 of OD(84) 2 are -

(i) the sum we should aim to accumulate and how to present any decision publicly. If Ministers have decided initially only to restrict payments out, then the maximum rate at which we can accumulate refunds by withholding is about £100 million a month. The Government have three broad options as to the amount they might announce that they are initially seeking to accumulate:-

- (a) the full amount of the remaining (disputed) element of the risk-sharing payment for 1982 and the full refund for 1983, together totalling about £630 million;
- (b) the full amount of the 1983 refund (£572 million);
- (c) the 'obligatory' element of our 1983 refund (£425 million).

The arguments in favour of each course are set out in paragraph 12. A decision can only be taken in the knowledge of the precise circumstances which has led the Government to withhold. It is important, however, that a decision to start with the withholding of the £425 million which the European Parliament has wrongly classified as non-obligatory and transferred to the reserve chapter of the budget would not preclude a decision to withhold further sums later if a settlement had not been reached. The financial impact on the Community of withholding in 1984 would be small, since the budget already provides for expenditure on our 1983 refunds, unless we were to continue withholding more than our refund entitlement.

The draft statement at Annex A to the Treasury paper has been prepared to deal with each of the options, and also

with the possibility of both early or deferred legislation. Ministers will need to consider this carefully at the time of any decision to withhold.

(ii) when to legislate. The arguments are dealt with in paragraphs 22 to 28 of the Treasury paper. The effective choice lies between legislating at the outset and legislating retrospectively in response to need.

On the one hand, the Law Officers have advised that, with one exception, the only safe course would be to introduce legislation at the outset. The Law Officers' clearly expressed advice (at Annex B) is that withholding would be illegal in both Community and in domestic law and that the risk of action against the Government either in the United Kingdom Courts or before the European Court is not negligible, and that sooner or later a Court could be expected to find against the Government. If questioned in the Houses of Parliament, the Law Officers would have to say that withholding was unlawful. There is also the problem of the position of Sir Peter Middleton, the Accounting Officer for the Consolidated Fund, and of the Treasury Accountant. In the absence of legislation, other action (see para 27) would be needed to protect the position of officials, but this would expose Ministers further.

On the other hand, it is argued that the introduction of this legislation would itself have major consequences, both constitutionally and in the eyes of the rest of the Community, going well beyond the act of withholding alone. It might be seen as setting an undesirable precedent for other member states and would be seen as a major escalation of the dispute.

An additional point of importance is that the Law Officers took the view that it would not have been unacceptable to have acted without legislative cover in the circumstances of 1982 when only the European Parliament was blocking our agreed refunds, which the Council and the Commission had said they would honour. The most likely hypothesis is that

these circumstances will be repeated and that our dispute will be with the European Parliament which is continuing to block the agreed 1983 refund. If so, the test which the Law Officers will apply is whether the risk of challenge is likely to be sufficiently small. This major question can only be decided at the time of a decision to withhold, but it would be most useful for the issues to be given preliminary consideration at this stage.

Handling

7. You may wish to invite the Chancellor of the Exchequer to comment on the Treasury paper attached to OD(84) 2 before inviting the Committee to give its provisional views on the points in paragraph 2 of OD(84) 2 and having a preliminary discussion of the points in paragraph 3. The Foreign and Commonwealth Secretary, the Attorney General and probably the Lord Chancellor will have views.

8. You may also wish to invite the same Ministers to comment on the question whether a White Paper on the lines of the text in OD(84) 4 should be published in the event of a decision to withhold Community funds.

Conclusions

9. You will wish the Committee -

(i) to reach provisional conclusions on the operating questions listed in paragraph 2 of OD(84) 2, so that contingency planning can be completed;

(ii) to have an exchange of views on the questions (extent of withholding, timing of legislation) in paragraph 3 of OD(84) 2 and to reach provisional conclusions, if this seems appropriate. The final decisions on these very important questions could only be taken in the context of a decision on withholding itself;

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(iii) to decide (para 2 of OD(84) 4) in principle whether or not a White Paper would be published simultaneously if the Government were to decide to withhold Community funds.

Cabinet Office

17 February 1984

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