

NICHAEAL BUTLER ON WITHOLDING.

105-121

ADVANCE COPY

PS. (7)
PS/POS
SIR C TUCKER.

IMMEDIATE

~~MR. HANWAY~~
MR HANWAY

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TO IMMEDIATE FCO

TELEGRAM NUMBER 1032 OF 21 MARCH

mt

PS/CHANCELLOR } TREASURY
MR UNWIN

MR. Coles No. 10.
Dawling St

'SAFEGUARDING OUR POSITION' : TIMING OF LEGISLATION

1. I MENTIONED TO THE PRIME MINISTER IN THE CAR GOING TO THE AIRPORT THE ANXIETY I FEEL ABOUT THE CONSEQUENCES OF A DECISION TO LEGISLATE AT THE OUTSET. I AM SENDING THIS TELEGRAM SINCE THERE WAS NO TIME TO EXPLAIN MY THOUGHT FULLY.

2. LEGISLATION TO SET ASIDE THE EUROPEAN COMMUNITIES ACT, EVEN TEMPORARILY, WILL BE WIDELY REGARDED IN THE COMMUNITY AS UNDERMINING ITS CONSTITUTION, OVERTURNING THE RULE OF COMMUNITY LAW AND A CONFIRMATION OF THE DARK SUSPICIONS OF MANY 'EUROPEANS' ABOUT OUR COMMITMENT TO, AND FITNESS TO PARTICIPATE IN, THE MOVEMENT TOWARDS EUROPEAN UNITY. BOTH THE COMMISSION AND THE EUROPEAN COURT HAVE CONSISTENTLY, THOUGH TACITLY, SOUGHT TO AVOID PUSHING ANY MEMBER STATE SO HARD ON MATTERS OF COMPLIANCE WITH COMMUNITY LAW THAT THEY MIGHT FIND IT POLITICALLY IMPOSSIBLE NOT TO TAKE LEGISLATIVE ACTION TO FREE THEMSELVES OF ITS CONSTRAINTS. THEY RIGHTLY FEEL THAT IF ONE COUNTRY SETS A PRECEDENT OTHERS WILL FOLLOW IT. ALL OUR ALLEGED MISDEEDS IN THE PAST, SUCH AS NOT ACCEPTING COMMUNITY IDEOLOGY ABOUT NET CONTRIBUTIONS, WOULD PALE INTO INSIGNIFICANCE COMPARED WITH SUCH A BLOW TO THE COMMUNITY'S STILL RELATIVELY FRAGILE LEGAL AND CONSTITUTIONAL STRUCTURE.

3. MY COREPER COLLEAGUES, FOR EXAMPLE, ARE AT THE MOMENT RELAXED ABOUT THE POSSIBILITY OF OUR SAFEGUARDING OUR POSITION (I HOPE WE CAN ALWAYS USE THIS PHRASE AND NOT WITHOLDING) FOR WHICH I HAVE LONG BEEN PREPARING THEM. FRANCE AND BELGIUM HELD UP SOME OF THEIR PAYMENTS WHEN THEY DISAPPROVED OF THE 1982 BUDGET. OUR ACTION WOULD BE MORE SERIOUS BUT IS NOT DIFFERENT IN KIND. NEITHER AMONG THE PERMANENT REPRESENTATIONS NOR IN THE COMMISSION WILL THERE BE ANY MORAL SHOCK AT THE ACT OF TEMPORARILY BLOCKING TRANSFERS. I SHALL BE SURPRISED IF THERE IS ANY IMMEDIATE URGE TOWARDS RETALIATION OR ESCALATION OF THE DISPUTE IF WE PRESENT OUR ACTION IN A QUIET TONE AS THE MINIMUM NECESSARY TO SAFEGUARD OUR INTERESTS. THE SAME WILL NOT BE TRUE IF WE LEGISLATE.

OVER

THE COMMISSION WOULD BE BOUND BEFORE TOO LONG TO TAKE US TO

4. THE COMMISSION WOULD BE BOUND BEFORE TOO LONG TO TAKE US TO THE COURT. BUT TUGENDHAT MIGHT BE ABLE TO SLOW THINGS DOWN, E.G. BY ARGUING THAT THEY SHOULD ONLY INITIATE ACTION WHEN ONCE WE HAVE ACTUALLY REFUSED A TRANSFER AND THEN BY FOLLOWING THE PROCEDURES AT A PROPERLY DELIBERATE PACE. THE WAY WOULD THUS BE LEFT OPEN TO ACHIEVE A SETTLEMENT BEFORE THE ISSUE EVER CAME TO A CRUNCH.

5. I REALISE THAT WE WOULD PROBABLY HAVE TO SAY THAT WE WOULD IF ABSOLUTELY NECESSARY LEGISLATE. THIS WOULD INCREASE THE INDIGNATION BUT THE EFFECT WOULD BE FAR LESS. INDEED PARADOXICALLY THE THREAT OF LEGISLATION WOULD TEND TO MAKE THE COMMISSION MORE CAUTIOUS ABOUT PUSHING US INTO ACTUALLY DOING IT AND THEREFORE LESS LIKELY TO SEEK INTERIM MEASURES AT THE EUROPEAN COURT OR TO START TAKING RETALIATORY ACTION TO POSTPONE OR REDUCE COMMUNITY PAYMENTS IN THE UK.

6. I KNOW THAT YOU HAVE SET OUT THE ARGUMENTS ABOUT THIS FULLY YOURSELF AND SO I WILL NOT GO INTO THE QUESTION OF THE LIKELIHOOD OF ACTION IN THE UK COURTS IN THE EARLY STAGES. I WOULD, HOWEVER, LIKE TO COMMENT ON THE LINE THAT THE GOVERNMENT MIGHT TAKE IF ACCUSED, IN PARLIAMENT OR OUTSIDE, OF BREAKING THE LAW. I DO NOT SUGGEST THAT WE SHOULD ARGUE THAT OUR ACTION IS INDUBITABLY LEGAL. THAT WOULD BE SCARCELY CREDIBLE. BUT I DO THINK THAT A LEGAL DEFENCE CAN BE ERECTED ON THE BASIS OF THE FACTS IN THE DRAFT WHITE PAPER. WHEN CHALLENGED WE COULD TAKE THE LINE THAT:-

(A) THE COMMUNITY'S ACTION ON THE 1982 RISK SHARING MONEY WAS IN OUR VIEW ILLEGAL;

(B) ITS ACTION ON OUR 1983 REFUNDS CONTRAVENED AN AGREEMENT AND FRUSTRATED A LEGITIMATE EXPECTATION AND THAT, THEREFORE,

(C) OUR ACTION TO SAFEGUARD OUR INTERESTS IS A MINIMAL STEP NECESSARY TO OFFSET THE DELETERIOUS EFFECT ON US OF THESE ILLEGAL AND/OR IMPROPER ACTIONS.

WE COULD SAY THAT WE RECOGNISE THAT THE POSSIBILITY ARISES OF CHALLENGE BEFORE THE EUROPEAN COURT, THOUGH THE ONLY RIGHT AND PROPER WAY TO RESTORE THE POSITION TO NORMAL IS FOR THOSE LIKE THE FRENCH AND ITALIANS WHO HAVE FRUSTRATED THE IMPLEMENTATION OF THE AGREEMENT TO RECONSIDER THEIR DECISIONS AS SOON AS POSSIBLE.

WE COULD ADD (A) THAT THE RIGHT WAY TO SETTLE THIS POLITICAL DISPUTE IS NOT TO GO TO COURT BUT TO GET BACK TO THE NEGOTIATING TABLE; AND (B) THAT IF WE WERE CHALLENGED IN THE EUROPEAN COURT WE SHOULD HAVE A DEFENCE TO OFFER AND, PENDING ANY JUDGEMENT, A UK COURT FACED WITH AN ACTION SHOULD REFER THE MATTER TO THE EUROPEAN COURT FOR A RULING. (IF WE WERE GOING TO DEFEND OURSELVES WE SHOULD SURELY HAVE TO SAY THAT WE HAD A DEFENCE TO OFFER RATHER THAN PLEAD GUILTY IN ADVANCE).

FCO ADVANCE TO:

FCO - PS, PS/PUS, TICKELL, HANNAY

CAB - WILLIAMSON

TSY - PS/CHANCELLOR, UNWIN

NO.10- COLES

BUTLER