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CABINET

COMMISSION DIRECTIVE UNDER ARTICLE 90 OF THE TREATY
OF ROME

Memorandum by the Lord President of the Council

THE ISSUE

1. We need to decide whether to challenge a Commission Directive in the European Court of Justice under Article 173 of the Treaty of Rome. If we want to mount a direct challenge we must institute proceedings no later than 22 September to meet the two-month deadline prescribed in that Article. Contingent pleadings, summarised at Annex A, have been prepared to this end.
2. The Directive (no 80/723), which was adopted by the Commission in July under Article 90 of the Rome Treaty, is designed to bring greater transparency into the financial relations between the member states and their public undertakings. It will enable the Commission to examine these financial relations in order to assess whether any national aids or subsidies have been granted contrary to the provisions of the Treaty.
3. The adoption of this Directive has created a conflict between our industrial and commercial interest in supporting a measure which could help to improve our industries' competitiveness and our constitutional and legal interest in seeing that the Commission do not gain power at the expense of the Council of Ministers.
4. Following correspondence among the colleagues concerned, the Ministerial Sub-Committee on European Questions of the Defence and Overseas Policy Committee (OD(E)) accordingly met under my chairmanship on 15 September to consider whether the United Kingdom should challenge the Directive. Since we were unable to resolve the conflict of interests I was invited to bring the issue to the attention of the Cabinet.

THE CASE FOR AND AGAINST A CHALLENGE

5. The case for a challenge may be summarised as follows:-

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i. The legal argument briefly rehearsed at Annex A is essentially about a transfer of power from the Council to the Commission and hence raises issues which go wider than the Directive itself.

ii. If we do not challenge the Directive now we will not be able to do so in the event that the Commission decide to amend the Directive to extend it to sectors now excluded such as energy or to require the pre-notification of aids.

iii. Confirmation of Commission powers in this area might preclude concurrent Council action under Article 94 and would preclude the use by the Council of Article 235 in the same field (because power would be deemed to exist elsewhere in the Treaty).

iv. The Solicitor General has advised that we have a substantial and respectable case to put before the Court and that, while any challenge is bound to carry some risk, we have a good fighting chance of succeeding.

6. The case against a challenge may be summarised as follows:-

i. Given the relative openness of the Government's relations with the public sector, we have little if anything to lose in terms of the domestic effects of the Directive. Our decision to sever the link between the British National Oil Corporation and the National Oil Account, once implemented, would remove much of the sensitivity from any later extension of the Directive's scope to the energy sector.

ii. The Directive's main impact is likely to be felt in France and Italy, whose opaque state aid arrangements often operate to the disadvantage of our industry. It thus represents one positive, if limited, step towards redressing the imbalance between the already exposed United Kingdom position and the far less transparent arrangements in other member states. Since there is no prospect of the Council agreeing to take action in this area we should not seek to inhibit the Commission from doing something which is in our interest.

iii. A challenge would conflict with our repeated expressions of concern to see the Commission take more effective action against the subsidies given by other member states and could weaken the force of any future representations we make to the Commission on this subject. It might also be difficult to defend to sectors of British industry, including the fishermen and farmers, who see themselves as victims of abuses in other member states.

iv. There is a risk that the Court could endorse the Commission's action and adopt a dynamic interpretation of the Commission's powers which would make it more difficult to oppose their future expansion in directions contrary to our interests.

THE ATTITUDES OF OTHER MEMBER STATES

7. When OD(E) discussed this question the attitudes of France and Italy were still unclear. It now appears that both have decided to challenge the Directive on broadly the same constitutional grounds as those we might put forward, though each might advance some arguments with which the United Kingdom would not wish to be associated. All other member states are content with the Directive.

THE OPTIONS

8. We can:-

- i. Take no action against the Directive, leaving the Italians and French to bring the issue to the Court on grounds of their own choosing.
- ii. Intervene later in any actions brought by Italy or France, in which event the terms of our intervention would to a large extent be dictated by the pleadings of the parties to the action.
- iii. Mount a direct challenge ourselves before 22 September.

In the OD(E) discussion opinion was divided between courses i. and iii.; no-one saw much merit in course ii.

CONCLUSION

9. I invite my Cabinet colleagues to decide which of the foregoing courses the United Kingdom should adopt.

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Civil Service Department

16 September 1980

SUMMARY OF MAIN ARGUMENT ADVANCED IN DRAFT PLEADING

- i. The proper scope and function of Article 90(3) are to empower the Commission to act where a national measure results in an infringement, in the case of a public undertaking, of the Treaty, and especially of the competition rules in Articles 85 and 86.
- ii. Article 90(3) does not confer general law-making powers on the Commission. This is evident from the wording of the Article and, subject to very limited exceptions, from the absence from the Treaty as a whole of any legislative powers exercisable by the Commission other than delegated powers.
- iii. In any event, Article 90(3) does not confer law-making powers in respect of state aids. Where the Treaty expressly confers a specific competence on a Community institution, that competence cannot be exercised by another institution. Any rules about aids to undertakings and their notification to the Commission which are necessary for the application of the rules on state aids in Articles 92 and 93 should be made by the Council under Article 94.
- iv. Article 90(1) is aimed at legislative measures or administrative practices in member states. It is not apt to cover individual executive acts to which the directive purports to apply.