
CONFIDENTIALPRIME MINISTERCommission Directive Under Article 90 of the Treaty of Rome
(C(80) 53)

The question for Cabinet is whether the United Kingdom should challenge the vires of a Commission Directive in the European Court of Justice under Article 173 of the Treaty of Rome. As this is a Commission Directive, it did not have to be agreed by the Council and there is nothing any Member State can now do to stop it taking effect short of challenging its legality in the Court.

2. Any challenge has to be lodged by 22nd September. OD(E) met on 15th September but were unable to agree. The Lord President was in the chair in the absence of the Foreign and Commonwealth Secretary. The issue comes to Cabinet because no OD could conveniently be arranged in the meantime.

3. The conflict of interest mentioned in paragraph 3 of the Lord President's paper arises because:-

- (a) On the one hand it is in our interest to support a measure whose substance will enable the Commission to probe more effectively into the concealed subsidies granted by other Member States - especially Italy and France - to their public sector industries.
- (b) On the other hand it may be contrary to our interests to acquiesce in the means chosen by the Commission, since they involve an arguably improper extension of the Commission's powers at the expense of the Council and could if unchecked leave the door open to further Commission encroachment in the state aids field in the future.

The Opposition would no doubt criticise a failure of the Government to challenge an attempt by the Commission to extend its powers, especially when it might threaten the nationalised industries. The Government might wish to demonstrate its different attitude towards state aid, and the Community, by not doing so. So far, the Secretary of State for Industry (who is in the lead on the substance of the Directive), the Lord President of the Council and the Lord Privy Seal have given greater weight to the considerations of national interest in the substance of the Directive, and are therefore against a challenge. They think that British industry

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would not understand the Government objecting to a measure which might remove some unfair competition. The Chancellor of the Exchequer, the Lord Chancellor and the Solicitor General have been sceptical about the real value of the measure, are more concerned with the point of constitutional principle, and think we should challenge.

4. The Secretary of State for Trade argued against a challenge in the Ministerial correspondence, on the grounds that better enforcement of the rules of competition could only do us good, but in OD(E) he was worried about the extension of Commission competence and felt that the issue merited wider consideration. The Secretary of State for Energy has been concerned lest a later extension of the Directive to cover energy should put the affairs of BNOC under Commission scrutiny, but did not press for a challenge given that the proposed severance of the link between BNOC and the National Oil Account will lessen our vulnerability on this point.

5. Since OD(E) met it has become clear that both France and Italy intend to challenge the Directive themselves. This new factor might be a means of reconciling our conflicting national interests, since it means that the constitutional issue will be put to the Court - albeit perhaps not in precisely the form we should have chosen - without our having to run the risk of attracting criticism from British industry for mounting a challenge ourselves.

HANDLING

6. You will want to invite the Lord President to introduce his paper in his capacity as Chairman of the OD(E) meeting at which this issue was discussed.

7. It might next be helpful to ask the Foreign and Commonwealth Secretary or the Lord Privy Seal to confirm that both France and Italy have lodged a challenge, and that it is likely to cover the main constitutional point.

8. You might then direct the Cabinet's attention straightaway to the options set out in paragraph 8 of C(80) 53, taking account of the pros and cons of a challenge as summarised in paragraph 6. You might also wish to invite the Secretary of State for Industry to state the case against a challenge, after which the Lord Chancellor and/or the Solicitor General might be invited to put the dangers of letting this case go, and advise on the chances of any challenge succeeding. The Lord Advocate may take a less sanguine view on this latter point.



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9. The Foreign and Commonwealth Secretary or the Lord Privy Seal might give their views and ~~to~~ comment on the implications of a challenge for our relations with the Commission and the Community in general.

10. You might also wish to invite the views of the Chancellor of the Exchequer, the Secretary of State for Energy and the Minister of Agriculture.

CONCLUSIONS

11. Subject to the discussion you may be able to conclude that:

- (i) Option (ii) - intervention in the proceedings brought by France and Italy - is ruled out as giving us the worst of both worlds, in that it would look weak to our partners, would not avoid criticism from industry at home and yet would not give us freedom to frame a challenge in our own terms.
- (ii) The arguments for and against a direct challenge are finely balanced, but given the French and Italian actions we do not need to institute proceedings ourselves in order to protect the Council's position.
- (iii) We should therefore opt for course (i).

(Robert Armstrong)

17th September 1980



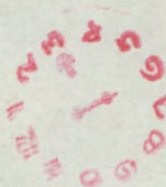
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The Minister of Finance has received a copy of the report of the Committee on the Review of the Taxation of Income from the Department of Finance. The report is being reviewed and a decision will be made in due course.

COMMITTEE

- (i) The Committee is of the opinion that the proposed changes in the taxation of income from the Department of Finance are desirable and should be implemented as soon as possible.
- (ii) The Committee is of the opinion that the proposed changes in the taxation of income from the Department of Finance are desirable and should be implemented as soon as possible.
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