CONFIDENTIAL

CABINET OFFICE

From the Minister of State

Lord Gowrie

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The Rt Hon Sir Michael Havers QC MP
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5/8

attached.

Dear Michael,

EC'S ACQUIRED RIGHTS DIRECTIVE

I was most interested to see a copy of your letter of 26 July to Peter Rees on the question of the EC's Acquired Rights Directive to the Government's programme for privatisation and hivings-off. Following the issue of the Joint Opinion on this matter on 11 May 1983, we had thought that the Directive was virtually all-embracing for departmental programmes in this area, due to the generality of the definition of an 'undertaking'. It now seems that you are offering a rather less restrictive interpretation of the scope of the Directive which could be of significant benefit to departments - albeit still catching some of the major programmes such as the Royal Ordnance Factories - by suggesting that it would be defensible to take the line that it only applies to economic activities. Given our earlier interpretation of the Directive, I think it would be useful if I could run over a few points to ensure that we now have the position firmly on board.

As I understand your letter, the position on the Directive runs as follows:

a. Whilst there is a significant risk that the European Court would not uphold the distinction that the Directive only applies to activities of an economic character, there are defensible grounds for maintaining that distinction until such time as the Court were to rule otherwise;

b. We can be fortified in maintaining the distinction by the Commission's apparent acceptance hitherto of the way in which the Transfer of Undertakings Regulations have been drafted; and

c. As it is impossible to take the legal position further, colleagues should decide how to act in the light of the risk outlined at a. above.

If I may say so, this advice seems - to a non-lawyer at least - somewhat at variance with the earlier Opinion. First, I had thought that the various arguments in favour of a purely economic interpretation, which we might use in our defence should a case be bought against us in the European Court, had been advanced and analysed, but led to the conclusion that there was a significant risk that it would rule that an 'undertaking' was not restricted in this manner. In particular it was said that:

> 'Activities of an economic character, particularly when looked at in the context of harmonisation of laws protecting the rights of employees, are wide in scope (and go wider than the concept adopted in the Regulations of a 'commercial venture' would suggest).'

If we were now to adopt the 'activities of an economic character' distinction, I also wonder how that phrase would be defined. An earlier problem seemed to be that it was easier to recognise than to describe such an activity, and I suspect that we will inevitably have to fall back on the definition given in the Regulations, ie a commercial venture. Does this, in turn, mean that the Regulations are not defective and can be applied? I also wonder if we should take comfort from the fact that the Commission has not previously challenged the distinction drawn in the Regulations enforcing the Directive. The analysis in the Opinion did, after all, indicate that its conclusion of significant risk was reached, "Notwithstanding the Commission's previous acquiescence".

I am also a little concerned at the suggestion that colleagues should, against the background of that risk, decide whether they wish to proceed on the basis that the Directive was of general application or only caught 'economic activities'. The Opinion stated that: 'the Crown should adopt a consistent attitude in relation to undertakings to be transferred.....' Would it not be very much more difficult, in terms of complying with the Directive, to defend a position where some undertakings, because of their commercial nature were subject to the regulations, and others were not? I wonder if we are not in some danger of becoming embroiled in such an indefensible situation if colleagues proceed on the basis of the dictates of administrative convenience, rather than the interpretation of the law.

I am sorry to trouble you further with questions on this complex matter, which obviously has already occupied much of your time, but I do feel that we can only sensibly proceed if we at the centre have a full understanding of the situation, and can give sound guidance on the basis of that understanding.

I am copying this letter to the recipients of yours and to Michael Heseltine.

Yours,
Tony

LORD GOWRIE