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INVERGORDON SMELTER: PROPOSED NEW POWER CONTRACT

I have seen the Memorandum of the Secretary of State for Scotland (E(80)31) and, in view of the proposal to legislate to remove, for limited purposes, the "undue preference" provision in the Electricity (Scotland) Act 1979 as it affects the North of Scotland Hydro-Electric Board (NSHEB), and the fact that the Secretary of State considers the "Coal Option" unrealistic, I confine myself to examining the Community implications of the "Hydro option".

I consider that if the price for Hydro Electricity charged to the smelter operator is reasonably related to the actual cost of producing the electricity any possible difficulties would be minimised. In particular, having regard to the EEC Treaty, the principal source of difficulty would seem to be in relation to that aspect of the proposal which could be said to constitute a State Aid within the meaning of Article 92 of the EEC Treaty. However bearing in mind the employment situation and other conditions in that part of Scotland, it seems reasonable to assume that the Commission could be persuaded that Article 92.3(a) was applicable; namely that the aid was to promote the economic development of an area where the standard of living is abnormally low or where there is serious under-employment.

It would also be of assistance if the price proposed to be charged could be shown to be comparable with the cost of electricity to other aluminium producers elsewhere in the Community.

It is possible that Article 86 might also be relevant in relation to the imposition of unfair trading conditions or the application of dissimilar conditions to equivalent transactions. However since it appears that the smelter would take the equivalent of some 50% of the NSHEB output and that no other consumer comes within reach of that level of consumption it seems unlikely that this would be a real difficulty. In that connection, consideration would also require to be given to the effect of Article 90.2 since clearly the NSHEB is an undertaking entrusted with the operation of a service of general economic interest.

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However if the Commission do agree to the State Aid aspect of the proposed scheme in terms of Article 92.3, the risk of their opposing the scheme under Article 86 or 90 would obviously be minimised.

Whatever happens it would be essential that there be full consultation with the Commission in relation both to the legislative form of the proposal and to the way in which it would be expected to operate. In addition, in so far as the scheme constitutes a State Aid, it would require to be notified to the Commission under Article 93.3.

My view is based on the information in the Secretary of State's Memorandum, but there are a number of factual points in respect of which I would require further information before I could give any more specific advice.

This Minute is copied to other Members of E Committee, the Secretary of State for Scotland, the Attorney General and to Sir Robert Armstrong.

Cms

for M of C

19th March 1982

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