

Home Affairs ²

01-405 7641 Extn 3201

ROYAL COURTS OF JUSTICE

LONDON, WC2A 2LL

Prime Minister

The A-G reports that this issue has not caused a major row on this occasion, but the basic legality remains to be tested.

THE SECRETARY OF STATE FOR FOREIGN AFFAIRS*legality remains to be tested.**MAR 29/11*COMMISSION'S POWERS OF ENTRY UNDER REGULATION 17/62

Thank you for your minute No FCS/80/176 (undated). As you know, the current investigations have now been concluded without serious trouble. In one case I was on the point of applying to the High Court for an injunction in pursuance of our undertaking to the Commission that we would do so if they met with actual obstruction, but the company concerned fortunately gave way almost at the last minute. The other companies have co-operated with the Commission's officials but have formally reserved their right to pursue the point on validation later. The most likely occasion for them to do so will be if and when the Commission makes an adverse decision against them on the substance of the matter and in the light of evidence produced by the investigation. If the legality of validation is then still a live issue between the Commission and us, such proceedings might suit us very well. If it is not a live issue, we would probably prefer not to have the question litigated at all. But we are in the hands of the companies concerned and I do not think that there is anything we can or should do to try to influence their decision.

In the meantime, the Head of the Commission's Legal Services did come over for a discussion, as envisaged in paragraph 5 of your minute. This discussion, first with officials of all the Departments concerned and then with me, went very well indeed and there seems to be a good prospect that, when the new Commission takes office in January, a satisfactory modus operandi will be found which will remove our misgivings about delegation while at the same time preserving the flexibility of the Commission's procedures in this particular kind of case and casting no doubt on the validity of their practice of delegating powers in other fields where we have no interest in raising objections.

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If all this works out, we shall not need to take any decision about whether we ourselves should initiate proceedings of the kind you have in mind. If things do not work out, we may have to grapple with that problem and I accept entirely that you and, indeed, other colleagues must be consulted before any firm decisions are taken. But, in the circumstances I have described, I suggest that we can put the matter aside for the time being.

I am copying this minute to the Prime Minister, to all members of the OD(E), to the Lord Advocate and to the Minister of Transport.

M.H.

LAW OFFICERS' DEPARTMENT
19 December 1980

r29/12



Prime Minister

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FCS/80/176

Handwritten initials

THE ATTORNEY-GENERAL

Commission's Powers of Entry Under Regulation 17/62

1. After we received your letter of 5 December Sir Michael Butler explained to M. Vouel your doubts about the legality of the Commission's proposed procedure, and asked him to postpone the visits which the Commission proposed to make on 9 December so that the Commission as a whole could take the necessary decision. However, as you will be aware, M. Vouel refused to do as we asked, on the grounds that the Commission was satisfied of the legality of their procedure.

2. In these circumstances I accept your view that it was your duty to inform the first company on 9 December of your doubts.

3. I have, however, serious misgivings about the further suggestion that the United Kingdom should commence an action against the Commission under Article 173. My advisers consider that it would have little chance of success in the European Court. I am also influenced by the fact that the practice whereby the Commission delegates its powers to one Commissioner is of long standing and has been used in many contexts. The repayment to the United Kingdom of refunds of excess budget contributions under the Supplementary Measures Regulation, a decision about which is to be taken by the Commission on 10 December, is only one example. For these reasons I would be reluctant to see the Government launch such proceedings.

Handwritten notes:
What about
the
A-G's
view.
This is a
legal
matter on
which we
must take
his advice
not.

4. Now that the Office of Fair Trading have alerted the company to the possibility of some kind of challenge. I think it would be better in response to any further approach from the company for us to encourage it to take its own legal advice and to bring its own action in the European Court under Article 173, if it judges it to be in its best interests to do so. I am

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advised that this would in any event be more in accordance with usual practice in such cases:

5. A new situation may of course arise if you have to apply to our own courts in order to assist the Commission to carry out its searches. But even in those circumstances I think we would need to consider our interest very carefully before ourselves initiating proceedings in the Court of Justice. If a problem of that sort does arise I should like to be consulted again. Meanwhile, I understand that Mr Jenkins may suggest that the Head of the Commission Legal Services should discuss the issues involved with us to see if a satisfactory solution can be obtained. This seems to me to be a helpful proposal which we could usefully take up.

6. I am sending copies of this minute to the Prime Minister, to all members of OD(E), to the Lord Advocate and to the Minister of Transport.

C
/

(CARRINGTON)

Foreign and Commonwealth Office

(December 1980)



✓ MAJ

Attorney General

COMMISSION POWERS OF ENTRY UNDER REGULATION 17/62

I have seen your minute of 19 December to the Secretary of State for Foreign and Commonwealth Affairs. Given that the companies have cooperated with the Commission's officials, I agree that it is best that we should now leave it to their judgement as to whether they wish to challenge the legality of the validation of the investigations.

2. I am glad that the visit of Mr Ehlermann, the Head of the Commission Legal Services, went well, and am grateful to you for finding time to meet him. Officials are in touch on the best means of following up this visit; and UKREP will be trying to find out how his thinking on ways of sorting out the present imbroglio has progressed, and how we can best lobby the new Commission. I welcome your proposal that we should set aside the question of initiating any action at this stage, and your willingness to consult colleagues before any firm decisions are taken.

3. I am copying this minute to the Prime Minister, to other Members of OD(E), to the Lord Advocate, to the Secretary of State for Transport and to Sir R Armstrong.

I.H.G.

7 January 1981

no

PM's qualified approval
relayed to M. Franklin's
Office. C.B. 812

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Prime Minister

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Sir A. Butler is being
instructed to take up the
Attorney General's point with the
Commission on Monday. It is
essential that in cases like these
there should be absolutely no doubt
that the ^{proper} procedures have been observed
to the letter.

(2)

5 December, 1980.

I assume that this
is not the first
time that
certain cases
have involved in the UK?
MT

Dear Peter,

Am
S/xii

COMMISSION'S POWERS OF ENTRY UNDER REGULATION EC 17/62

You will be aware that, in exercise of the power conferred by Article 14(3) of the above Regulations, the Commission propose to carry out an "unannounced" investigation of certain British companies. I am told that four companies are now to be investigated in this way and that the first of these investigations is to take place on Tuesday. Under the relevant procedure Commission officials will simply turn up at the premises of the company concerned, produce a certified copy of the Commission's decision and then, without any authorisation by a Court or anybody else, assert the right to enter the premises, search all the books, records and other similar documents kept there, take copies of any such documents away with them, and interrogate the staff. If the company refuses to co-operate or obstructs the investigation or deliberately or negligently supplies misleading or incomplete information, it could find itself subjected to a substantial fine. Under the Regulations the "competent authority" in this country (the Office of Fair Trading) has to be consulted before the decision to carry out an investigation is taken - this has been done - and it is the invariable practice (and arguably our duty) for us to send officials of the Office of Fair Trading to be present during the investigation in order to give the Commission's officials any assistance they need. In addition, if the company opposes the investigation, it is our legal duty to give the Commission's officials any necessary assistance to enable them to discharge their task and it has been agreed that in such a case our duty would have to be implemented by our instituting immediate proceedings in our own courts

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for an injunction requiring the company to submit: these proceedings would be instituted in my name.

All this may strike us as constituting a very drastic interference with the liberty of the subject but it is firmly based in Community law and in ordinary circumstances we have no option but to acquiesce in it and indeed to facilitate it. However, in the present case I have to say that I entertain substantial doubts whether the procedure that has been followed is indeed in accordance with Community law and therefore whether there is lawful authority for this interference with the ordinary rights of the company (for which, of course, there would otherwise certainly be no legal justification).

Briefly, the basis of my doubts is this. The relevant provision of Regulation 17, ie Article 14(3), requires a "decision" by the Commission. We have been told informally (but not, I think, clandestinely or in confidence) that the Commission has recently decided to adopt a new procedure according to which the decisions under, inter alia, Article 14(3) are taken by a single Commissioner and not by the Commission as a whole, and the decisions in the particular cases we are now concerned with were in fact so taken. But Article 17 of the Merger Treaty requires decisions of the Commission to be taken by a majority vote of the whole Commission. It is true that some years ago the Commission adopted a Rule of Procedure - and I think that this in itself is not objectionable - which permits them to delegate to a single Commissioner the power to take, in the name of the Commission, "clearly defined measures of management or administration", and it is under that Rule of Procedure that they have now purported to make the delegation in question. But I think that it is reasonably open to question whether a decision under Article 14(3) falls within that Rule of Procedure or whether, on any view, the Commission could

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authorise it to be taken by a single Commissioner. There is a dearth of direct authority on the point but there is some authority, in the form of cases decided by the European Court of Justice, which shows that there are some limits on the functions which the Commission can lawfully delegate and from which it could be argued that this delegation is on the wrong side of the line. As I understand it, the Commission themselves accept that there are legal limits to their power to delegate though they do not accept that they have transgressed those limits in the present case. I cannot give a definite assessment of what the European Court would decide if the issue came before it but I consider that the legal objection to the Commission's procedure would be a perfectly respectable one.

I have anxiously considered the position and in doing so have had the benefit of a thorough discussion with officials from the Departments directly concerned. I have decided that, entertaining these doubts as I do, it would be quite wrong for me to suppress them and let the investigation proceed, with our assistance, as in previous cases. Just as I have a duty to see that the machinery of the law is invoked and enforced in a proper case, I also have a duty to see that it is not invoked, so as to encroach on the liberty of the subject, in a case where I have any substantial doubt whether there is in fact lawful authority for proceeding: at the very least I must indicate the existence of my doubts to those concerned. In addition, I have in mind that, even if we agreed to suppress our doubts now, the point could come out subsequently, in this or in a later case, and I (and some of my colleagues) would be in an untenable position if we then had to admit - as we could not of course deny - that the doubt had occurred to us in the present case but we had done nothing to protect our citizens from what we thought might well be a questionably lawful encroachment on their liberties.

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I have therefore concluded that, if the Commission persist in proceedings on the present basis (as to which, I make some suggestions below), it will be my duty to see that the company concerned is alerted to the existence of the doubt so that it may take whatever steps it wishes in the light of the advice it obtains from its own legal advisers. (It could, for example, decline to admit the Commission's officials and apply immediately to the European Court for a review of the legality of the Commission's decision and in the meantime for a stay of the execution of the decision.) I am sure that the right way to do this is for the OFT officials who accompany the Commission's officials to hand over to the company, as soon as they present themselves, a letter which simply explains the position but makes no suggestion as to what the company should or should not do vis-a-vis the Commission. The terms of this letter will obviously have to be very carefully chosen: I understand that a draft is being considered by officials in the Departments concerned and I would wish to have the chance to approve it myself. Furthermore, if the Commission's officials then proceed to try to carry out an investigation and are then obstructed by the company, I will of course comply with our undertaking to institute proceedings for an injunction but I shall regard it as my duty to ensure that my doubts about the legal position are brought to the Court's attention. I should guess that the result of this will be that a Court will refuse an immediate injunction but will refer the question to the European Court under Article 177 of the Treaty.

I have considered whether it would be proper in this case for the OFT to decline to send their officials to accompany the officials at the investigation or for me to decline to assist the Commission by instituting proceedings, if I am so requested, for an injunction to compel the company's compliance. In my view this would be wrong.

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It is settled law that an act of a Community institution (in this case an act which purports to be a decision by the Commission) must be treated as lawful and effective until it is set aside by the Court and I think that we should be putting ourselves wholly in the wrong if we purported to treat it as a nullity.

This leads me to express the view that, if we are indeed driven to the point where we are publicly expressing doubts about the validity of the Commission's procedure and are, in effect, inviting the company in question to take the point themselves, our most respectable course would be to initiate, as soon as possible, formal proceedings under Article 173 of the Treaty to get the issue decided definitively by the European Court. I would recommend that we should explain to the Commission, at the appropriate time, that this is what we are doing or intending to do. I do not think that we could then be reasonably accused of inciting our companies to unlawful resistance to the Commission or of ourselves obstructing the Commission and it should reduce any disposition by the Commission to get their blow in first by starting infraction proceedings against us. But I recognise that there are questions of policy and tactics to be considered here and I do not consider that this is a decision for me to take.

Finally, there is the question of our immediate line with the Commission. This must be very much for you and other colleagues to decide in the light of what I have said I myself must do if the matter comes to a head. You may think it desirable, however, for the first step to be to make urgent representations to the Commission, at a very high level, explaining to them the doubts that we entertain and making it clear that, if they nevertheless proceed, we shall be unable to conceal those doubts. We could then suggest that, in these circumstances they might want to postpone Tuesday's investigation but only for so long as would be required for the Commission as a whole to meet and to

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take the necessary decision under Article 14(3), just as they have done in all previous cases. If they did this, our doubts would fall away and the investigation could proceed with our whole-hearted co-operation. I would hope that the Commission would see the reasonableness of these representations. If not, then we face the problem of what we should then tell them about how we should react. Subject to what I have said above about possible proceedings by us under Article 173, I do not think that I am in a position to offer advice on that.

I am copying this letter to the Prime Minister, to all members of OD(E) and to the Lord Advocate and the Minister of Transport.

Yours Ave.

Michael

The Rt Hon The Lord Carrington KCMG MC
Foreign Secretary
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