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15 May 1990

Prime Minister
All bad news.
BHP
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Department of the Environment
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Dear David,

COMMUNITY CHARGE

Thank you for your letter of 11 May which was discussed at the Solicitor General's meeting this morning. I reported on the outcome to John Catlin, but you may wish to have a record in writing.

Your first question is in two parts. As to the first, the Solicitor agrees with you that there is no logical reason to claim that SSA's are any more accurate than the old GRE's. This being so, it is necessary to retain a margin of error similar to that which operated under the old system. The 12.5% margin allows the Secretary of State to be reasonably sure that expenditure which exceeds that margin is "excessive" for the purposes of making an order under the 1988 Act. As for the second part of the question, the Solicitor agrees that a more generous settlement does not have a direct bearing on the accuracy of SSA's and that it would not of itself overcome objections that a particular SSA was an inaccurate reflection of a particular authority's need to spend. Accordingly, a more generous settlement would not justify, by itself, a narrower margin than the 12.5% figure. ∴ have a mean increase and stick to 12½%. AG

As for question (1a), the Solicitor agrees that the section 100(1)(b) criterion could be used in 1991/92 as by then there will have been a comparable preceding financial year under the new system which it would be reasonable to take into account for the purpose of using the excessive spending powers. As for question (1b), the figure of £75 was adopted as being equivalent to the maximum contribution per head to the safety net and was so adopted as a measure of the practical effect on a charge-payer. There was, however, no real connection of

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principle between the two. It followed that the £75 figure should be used in future years, uprated as necessary for inflation, so as to ensure continuity. It was important to note that, assuming success in the current judicial review proceedings, the figure of £75 will have survived challenge as a criterion and to depart from it subsequently would place the Secretary of State in difficulty.

The Solicitor agrees in relation to question (2) that an authority could not reasonably be expected to calculate in advance its likely grant from the public expenditure White Paper, or to have made its spending plans accordingly.

As far as question (3) is concerned, the Solicitor agrees that a court would be most reluctant to investigate the adequacy of an authority's resources to meet its statutory duties and would be even less likely to do so against the rejection by referendum of its plans to spend in excess of its limits.

Finally, the Solicitor does not believe that there is any way, not involving primary legislation, of safeguarding a designation principle set at less than the 12.5% excess over an authority's SSA.

Yours sincerely,

Michael Carpenter

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11 May 1990

COMMUNITY CHARGE

We have been asked by the Chancellor of the Exchequer to put to the Solicitor General some questions which have arisen in the context of the discussions on the future of the Community Charge. The first two questions are put in the context of the present capping regime. They are as follows:

1) Is 12½% above an authority's SSA the lowest we can safely go in determining principles for designation for charge limitation? Does this judgment depend upon the level of SSAs so that the more generous the settlement the closer to SSAs it is reasonable to go?

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We discussed this question before the designation criteria for 1990/91 were decided. I explained that 10% above or below GRE was the Department's assessment of the margin of error in GREs under the old system. The extra 2½% was an extra safety margin in cases where a particular SSA could be alleged to be particularly inaccurate.

Since we do not claim that 1990/91 SSAs are any more accurate than the old GREs it seemed prudent to retain the 12½% margin for charge limitation this year. It may be possible to argue that SSAs for subsequent years will become more accurate once certain anomalies have been removed although, given the nature of the SSA, there will inevitably be cases where individual authorities' need to spend may not be accurately reflected in certain spending assessments.

However, there is no particular legal significance about 12½%. The chosen percentages were originally linked to the system of targets and penalties introduced by the Local Government Finance Act 1982. It was considered necessary for policy reasons to ensure that all local authorities designated for rate capping were budgeting to keep their total expenditure below the threshold (ie. the point at which grant was abated more sharply). This threshold was fixed at 10% of the national average GRE per head but, because it was only an average, the additional 2½% was necessary to secure that the policy objective was achieved in relation to individual authorities. Depending on the terms of the court's judgment in the capping case, therefore, there may be room for some movement from 12½% in future years.

It does not appear to us that a more generous settlement would have a direct bearing on the accuracy of SSAs and their function as a means of distributing grant. The SSA for an authority for any year is broadly intended to represent the amount of revenue expenditure which it would be appropriate for the authority to incur in that year to provide a standard level of service

consistent with the Secretary of State's view of the amount of revenue expenditure which it would be appropriate for all local authorities to incur. This global figure is known as net Total Standard Spending (TSS) and is equal to the sum of all SSAs. In practice, however, the SSAs are derived from TSS which is divided into control totals for each of seven service blocks (Education, Personal Social Services, Police, Fire and Civil Defence etc) listed in Annex B to the distribution report (copy enclosed). A generous TSS would imply either that it would be appropriate for authorities as a whole to incur higher revenue expenditure to provide a standard level of service for a year, or that the 'standard' level of service was to be higher than in the previous year. It would no doubt be welcomed by local authorities as a more realistic assessment of their need to spend. But it would not of itself overcome objections that a particular SSA was an inaccurate reflection of a particular authority's need to spend.

(1a) We chose not to use the section 100(1)(b) (excessive increase) criterion in 1990/91 for practical reasons. Does the Solicitor General agree that this consideration would not apply in future years when a year on year comparison can more easily be made?

(1b) Similarly the "£75" element of the designation principles seemed an appropriate figure for 1990/91 given the effect of the safety net. Does the Solicitor General consider that the figure could be lower in future years when authorities will not be contributing to the safety net?

(2) Does the fact that in the public expenditure White Paper (published in January) local authorities are given details of the government's plans for local authority expenditure for the year ahead, and will thus be able to formulate their plans well in advance of that year, affect the reasonableness of any limits based on those assumptions which may be placed on individual authorities' expenditure?

We doubt whether much could be made of this in supporting the reasonableness of any limits set for individual authorities. The plans are for local authorities as a whole and cannot be applied with accuracy to individual authorities. They are also subject to change depending on the general economic situation prevailing in the year in question. We therefore doubt whether an authority could be expected to calculate in advance its likely grant, and forecast that a particular limit based on those projections would be likely to be applied to that authority for the year, and to have made its plans accordingly.

(3) If an authority's plans to spend in excess of its limits are rejected in a referendum, could the authority obtain relief from a court based on the assertion that it was unable to perform its statutory duties?

So far as the Department is aware rate limitation has only once been raised as a possible defence to an action for a breach of statutory duty. In a case concerning the London Borough of Hackney the court held that although rate limitation doubtless caused difficulties for the authority it was no defence to a clear breach of a specific duty imposed by statute. We consider that a court would be extremely reluctant to investigate the adequacy of an authority's resources to meet its statutory duties except possibly where the clearest case could be made out. Nor do we think that a court would have jurisdiction to grant a bare declaration that the authority was unable to fulfil its duties.

Of course, the authority may be driven to explore avenues of challenge, for example as to its SSA, although a fair amount of protection is afforded by the inclusion of SSA's in reports subject to the approval of the Commons.

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4) The Chancellor would also be grateful for any suggestion (short of a specific provision in primary legislation) which the Solicitor General may have for safeguarding a designation principle set at less than the 12½% excess over an authority's SSA.

I should add that some of the issues raised in this letter will be before the court in the charge capping case to be heard next month. The choice of the 12½% excess over SSA as a principle for designation, is a central feature of the case; and some authorities are also questioning the legality of interfering with school budgets under the LMS scheme. In our defence we would propose to deploy any argument open to us including, subject to counsel's advice, the reason for adopting the 12½% criterion.

Sgd

D J SERJEANT