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27B(a-h)

SOLICITOR GENERAL

Prime Minister

THE COMMUNITY CHARGE

1. Subject to an appeal to the Court of Appeal the Department of Environment was successful in all the charge capping cases in which judgment was given by the Divisional Court of Friday 15 June and the judgment of Lord Justice Leggatt has provided valuable confirmation of the working of the system of designation under the Local Government Finance Act 1988.

2. In the light of that judgment and generally this advice focuses

(1) on the ability of the Government to implement its policies on local government spending as indicated below under the present system contained in the Local Government Finance Act 1988 Section 100(1)(a) and (b); and

(2) on legal considerations relating to possible new legislation to strengthen the system.

3. In 1990/91 local authorities overspent by 12 % or some £3.8 billion above TSS. The question I am asked is therefore whether the present legal system is adequate to enable the Government to contain local authority spending effectively in the coming year. In particular, if the Treasury were to put substantially more money into AEF in order to benefit charge payers, is the present law sufficiently robust to prevent local authorities from simply using such extra monies to underpin their own increased spending, denying the benefit to charge payers, and leaving average community charges just as high or possibly even

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higher than they are today; or is new legislation necessary?

4. The present system

The crucial new feature of the present system which will become available for use if necessary in 1991/2 is year on year charge capping under Section 100(1)(b) of the Local Government Finance Act 1988. This provides that as regards a chargeable financial year the Secretary of State may designate a charging authority if in his opinion there is an excessive increase in the amount calculated by it under Section 95(4) in relation to the current year as compared to the preceding financial year; in other words an excessive increase in its budget year on year. There is corresponding provision for precepting authorities in section 100(2).

The great advantage of this system, as compared to the current charge capping under Section 100(1)(a) is that it does not depend upon the reliability of SSAs. The Secretary of State is entitled to look at local authority budgets for the current year and promulgate a policy permitting or restricting increased spending as he thinks fit. Provided his policy relates to all Local Authorities within a particular class under Section 100(5) (ie County Councils, District Councils etc) his policy is entitled to have a number of different facets. The following are possible examples designed to illustrate the legal principles but the policy would fall to be determined at the relevant time by the Secretary of State. For example, in relation to local authorities which had budgeted at or below SSA last year the Secretary of State's policy could be one of leaving them to spend at their discretion. For local authorities which had spent somewhat above SSA in 1990/91, his policy might be that in 1991/2 there should be a standstill in local authority spending in real terms having made allowance for extra burdens. In relation to

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higher spenders, he might wish to require phased decreases in spending in real terms to bring such local authorities back either at once or in due course to SSA levels. In principle there is no legal impediment to such policies.

5. In relation to the really high spenders eg. Bristol at 30% above SSA, there does not appear to be any serious legal problem in capping even under Section 100(1)(a) since their overspend is so manifestly excessive. The problem is the practical one of how fast they can realistically be brought back towards SSA levels. In setting their "maximum amounts" the Secretary of State must of course act reasonably. The only other attack that could be made in their case might be on their SSAs themselves on the basis that in setting them the Secretary of State had failed to take the proper matters into account or had in some way acted wholly unreasonably. But this year's limited attack on this basis has been repelled and there is likely to be a good chance of repelling such attacks in future years.

example?

6. The scope for local authorities to attack year on year charge capping under section 100(1)(b) by means of judicial review proceedings is likely to be much less than under Section 100(1)(a). The principal reason is that the benchmark in these cases against which spending increases or required decreases are to be judged is not SSAs set by the Secretary of State but are the local authorities' own budgets on which, after all, they have actually administered their area for the whole of the previous year. The Secretary of State must of course act in accordance with Wednesbury principles, but if his policy were, as I understand is likely, in setting the level for TSS for 1991/92, broadly to take account of a proper estimate of inflationary increases in local authority costs plus the cost of new burdens, it would be extremely difficult for the local authority to persuade a court that a policy which required a standstill on local authority spending at that level was one

infl" plus new exp.

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Easy for those who keep up last year

which no reasonable Secretary of State could adopt.

7. If it were desired to deter in advance potential overspenders, there would be no legal impediment to announcing the change of policy in advance, indeed such an announcement might be necessary to avoid the subsequent accusation when he comes to designate that he had taken the authority by surprise. For example when promulgating the Government's general policy in relation to AEF and the intended lightening of the burden on chargepayers, the Secretary of State could make it clear that in return for extra funding from central Government he would require such restraint; and could also make it clear that if his policy were ignored he would not hesitate to use his powers of designation under Section 100(1)(b) of the Act to enforce it. This would be considerably easier to do, even if the number of local authorities needing to be capped was much higher, precisely because, unlike capping under Section 100(1)(a), designation does not require an elaborate justification by the Secretary of State of his own SSAs in relation to each local authority.

8. Limitations

It must of course be borne in mind that, although year on year charge capping has very real strengths as advised above, it is always unwise to rely heavily on the law to support an unduly tight policy. If the courts perceive that real hardship has been caused or that policies are producing what seem to be absurd results, they are apt to be astute to find loopholes to try to ease the position. I see no particular reason why this should happen in the present case, but I give a more detailed explanation of possible danger areas in paragraph 12 below.

9. Statutory Duties

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It must also be borne closely in mind that too tight a policy may enable a local authority to seek judicial review on the basis that it will have insufficient money to enable it to fulfil its statutory duties.

10. Possible Strengthening Legislation

I now consider the proposals for legislation to strengthen the existing system which have been under consideration. These relate principally to the problem of designation under Section 100(1)(a) based on excessive spending above SSA. The proposal that has been indicated to me is that SSAs themselves should be strengthened by being placed within an express statutory framework; and the powers of the Secretary of State to designate at whatever level he thinks fit down to a minimum of 5% above SSA should be expressed in statute; and that this might be coupled with the safety valve of a referendum.

11. The advantage of incorporating each year's SSAs into a statutory instrument laid, debated, and approved for the purposes of distribution and/or capping by affirmative resolution following promulgation by the Secretary of State is that SSAs thus become protected by Nottinghamshire principles and in the absence of some blatant mistake or deceit of Parliament by the Secretary of State the court would be most unlikely to overturn them. The advantage of allowing capping by statute at anything down to 5% is, from a legal point of view, that it helps to overcome the present problem that SSAs cannot be said to be "accurate" to closer than 10% plus a 2.5% margin and hence capping for excess spending can currently only be down to 12.5% above SSA.

12. Treasury Counsel warns, however, that the value of the legislation will be affected by the drafting. For example, merely to give a power to cap down to 5% above SSA may not add

a great deal to existing powers. It would still be necessary to bear in mind the weakness of SSAs. In other words the Nottinghamshire principle must not be allowed to obscure the difference between a statutory provision conferring a discretion on the Secretary of State, albeit one requiring Parliamentary validation, which-notwithstanding the Nottinghamshire case-remains in the end subject at least to some degree of judicial scrutiny; and on the other hand a provision which on its face declares a particular state of affairs to be the law. If it is desired to use Section 100(1)(a) to cap so tightly ie. well below 12.5%, that it is recognised that it might attract a good Wednesbury challenge, it would be wise to include in the legislation words such as "an authority's budget which exceeds SSA + 5% is excessive for the purposes of this section". Such a provision would involve no judgement by the Secretary of State as to whether the authority's budget was excessive. The statute says it is. While no doubt the Secretary of State would retain the discretion whether or not to designate above 5%, any room for challenge to the exercise of that discretion would, Treasury Counsel is inclined to think, be more constrained than if the legislation were in a purely discretionary form such as "The Secretary of State may designate an authorities budget as excessive for the purposes of this section if it exceeds SSA + 5%". But whichever formulation is used Counsel again advises that there must be a risk that the protection which the Nottinghamshire case affords against Wednesbury challenge may come under strain if the courts are left with the clear impression that a requirement for House of Commons approval from the Secretary of State's decision has been inserted in legislation to cover what they might otherwise regard as a Wednesbury bad result.

13. The practical disadvantage of using such a new system as compared to capping under Section 100(1)(b) (which does not use SSAs in any event) is that local authorities would know that they

could spend up to 5% above SSA with impunity and the "ceiling" might well become a "floor". There would be opportunity for the local authority to increase its spending if it obtained approval from the electorate in a local referendum, but no opportunity to cap tighter. Such a proposal would, as I understand it, be in substitution for the present mechanism under both section 100(1)(a) and (b). It certainly could not sit happily with the present tighter powers under section 100(1)(b). The second disadvantage is that so obvious and tight a statutory capping power would apart from the referendum provision overtly weaken the concept of accountability which underlies the community charge system and which was expressly referred to by Leggatt LJ at page 21 of his judgment.

14. In practice it will always be difficult to enforce any policy generally right down to whatever limit the Government has set since the costs to a local authority of rebilling and the general administrative effort for the Department may well be too great to make it worthwhile for a very small excess.

15. I have little doubt that the scheme envisaged could be framed in legislation. The concept of a referendum would be consistent with accountability, but its organisation would give rise to a number of legal problems which would need to be dealt with in the legislation, and I should prefer to consider this further if firm proposals are to be brought forward. The qualifying majority would need to be determined as would the mechanism for framing the question. The safer course is to put as much of the detail as possible in the primary legislation, perhaps in a schedule to the Bill.

16. Scope of the Bill and Parliamentary Handling

Such a bill is likely to require clauses;

(a) to put SSAs into a statutory framework,

(b) to create a general power to cap any spending over 5% above

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SSA, or to render any such spending automatically excessive,

(c) to provide for the referendum,

(d) to provide for the relationship between capping, the referendum, the revision of budgets and rebilling,

(e) to provide necessary order and regulation making powers.

Since the concept of the SSA involves consideration of the individual circumstances of each local authority the Bill could be open to widespread amendment for those seeking to press the particular cases and special interests of each local authority. The Bill would, presumably, amend Part VII of the 1988 Act. As such it would be open to the risk that the House authorities would agree, under pressure, to the tabling of amendments more generally related to the community charge.

17. If the legislation were to operate in 1991/92 there are serious problems of timing. The legislation would need to be enacted by end February 1991 and would have to come into force immediately on Royal Assent. Even then, there would have to be some element of retrospection to validate the SSAs which would (under this scheme) have been used for the purpose of the grant settlement and for the purposes of capping provisions which would not be in force at the time SSAs were set. There will be a difficult handling problem in that the date of Royal Assent may not be predictable, thus requiring more retrospective provision than may ultimately turn out to be necessary, if only as a safeguard against slippage. The question of retrospection would need to be examined more closely if this option were to be adopted.

I am copying this minute to the Lord President of the Council, the Chancellor of the Exchequer, the Chancellor of the Duchy of Lancaster, the Secretaries of State for Scotland, Energy, the Environment and Wales, the Chief Secretary to the Treasury, the Chief Whip, the Minister for Local Government and to Sir Robin Butler.

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19 June 1990.

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