

PRIME MINISTERTHE COMMUNITY CHARGE: MINUTE FROM THE SOLICITOR GENERAL

I attach the minute from the Solicitor General setting out his considered advice on the more intensive use of existing capping powers. I have discussed with Richard Wilson and Peter Owen this afternoon how to take matters forward.

Solicitor General's minute

The advice from the Solicitor General is that under existing powers in Section 100(1)(b) of the 1988 Local Government Finance Act, the Government can create what amounts to a system of income limits on local authorities.

This advice suggests that existing powers are much more extensive than previously thought; than we were previously advised by the Solicitor General's officials; and than those drawing up the legislation two years ago envisaged.

The key to understanding that advice rests on two points.

- (i) First, the clauses in the 1988 Act mirror those in the 1984 Rates Act. The powers in the latter Act were drafted with a general system, as well as selective system, of rate capping in mind. Thus they permit, in the Solicitor General's view, a wide application to all authorities.
- (ii) Secondly, last Friday's judgment in the High Court on charge capping is critical. The key point is that the High Court took the view that "excessive" in the legislation could be determined in terms of a general, macroeconomical policy, promulgated by the Secretary of State rather than the circumstances of individual authorities.

Building on that High Court judgment, the Solicitor General proposes that the Secretary of State for the Environment could

promulgate in advance a policy permitting such spending increases as he sees fit (see paragraph 4). This approach could not be taken so far that it would be deemed unreasonable in Wednesbury terms. But his proposed approach for next year would be as follows:

- (a) No restrictions on spending increases for those spending at or below SSA this year.
- (b) Those spending at up to SSA +5% this year, would be restricted to a real terms standstill next year (allowing for any extra burdens); and
- (c) All those spending in excess of SSA +5% would be required to achieve real cuts in spending; this might be on a progressive tariff basis.

Assessment

You will recognise that the Solicitor General is now in effect saying that a system of cash limits or income limits can be introduced under the existing legislation. Indeed, if it is workable, this system would in principle be stronger than the enhanced capping regime requiring new legislation discussed at your last meeting.

This is startling, indeed astonishing, advice. However, the Solicitor General's minute is far from confined to objective legal matters but strays into policy judgments. That said, there are four issues now to be pursued:

- (i) How robust is this legal advice?
- (ii) Would Mr. Patten be prepared to implement the tough policy envisaged in this advice?
- (iii) What are the practical advantages in terms of spending and community charges if this approach were implemented?

- (iv) What strategy in further discussions should you pursue in the light of the Solicitor General's minute?

First, there is no doubt that the advice has come as a considerable surprise. And it is vital not to allow colleagues to seize upon this as a convenient way of avoiding potentially controversial legislation. The Solicitor General needs to be tested rigorously on what he is saying. And, at some stage, (though see below) you may want to take other legal advice on such a critical finding.

It must also be recognised that there will inevitably be judicial review under this approach. So there is a risk that the proposed regime would collapse. But it is of course also true that the enhanced capping regime enacted in legislation next session might also be challenged by the local authorities.

Second, since the strong powers available under existing legislation will also have come as a surprise to Mr. Patten, he may well argue that this approach should not be pursued with the maximum vigour which the Solicitor General's advice indicates is possible. If defining a criteria in advance did not deter local authorities from spending up there would be potentially large-scale capping involved. He may point out that there is no referendum provision, so central Government would be diluting local accountability. And he may argue that the Department does not have the resources to cope with the large number of derogations which might be sought.

But that seems a difficult position for him to sustain. No-one has denied in the meetings that, before any extra grant can be put in, a way must be found of preventing leakage into higher spending. If such a way is available without legislation, Mr. Patten may well be isolated if he tried to object.

Third, the approach needs to be exemplified. As the Solicitor General points out, income limits are a stronger power than enhanced capping. This means that, depending on the spending

policy promulgated, we can get a very good idea of what the spending outcome will be (subject to a technical point on use of balances). This means there should be greater certainty on the implications of any particular level of AEF for community charges. DOE need to be instructed to exemplify the Solicitor General's proposed approach.

Fourth, what strategy should you now adopt? At this stage, we do not know whether the approach will work. You will need to be cautious in pursuing it further. In discussion with Richard Wilson and Peter Owen, a possible way forward was identified.

- (i) *income limits* The first trick would be to get full agreement for pursuing the income limits approach that is contained in the Solicitor General's proposals.

- (ii) *accept income limits* Mr. Patten would then need to be signed up to announcing the proposed income limits next month. Once they are announced they should begin to have their deterrent effect, ie. discourage local authorities from budgeting in a way that risks capping.

- (iii) After that it should be a sensible precaution to test rigorously the robustness of the advice from the Solicitor General. That might be the appropriate time to seek alternative legal advice - ideally he should arrange for that (there are precedents).

- (iv) Depending on the outcome of that further examination, the Government would have to judge whether to enact stronger legislation now; or to risk failure at judicial review next spring, with an emergency - but less controversial with Government supporters - bill brought in thereafter (at a potentially awkward time) to restore the position as previously interpreted by the Government.

It remains vital not to give up the enhanced capping approach, unless and until (i) and (ii) above are secured.

The way forward

It remains vital to show surprise and a degree of suspicion about the validity of the Solicitor General's advice. Your line might be that you are by no means convinced the legislation is capable of the interpretation put upon it by the Solicitor General. And, until you are so persuaded, legislation to introduce enhanced capping remains your favoured option. Nevertheless, it is important to explore further the practical implications of what the Solicitor General has said.

Accordingly, the next step might be for you to write in this vein to Chris Patten asking him to give his views on the Solicitor General's minute; and to identify what would be the spending and, on given assumptions about AEF, community charge implications of pursuing the Solicitor General's specific proposals. (It is important that it is put this way to avoid DOE imposing their own policy proposals).

That would allow next Tuesday's discussion to consider (a) the Solicitor General's minute, (b) the minute from DOE commenting on his advice and setting out its practical implications and (c) a report on the negotiations on AEF between the Chief Secretary and Mr. Patten.

Content for me to minute as proposed, above?

AP

Yes?

PI BARRY POTTER

20 June 1990

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