

295(a-g)



The brief takes the same line as the note you saw earlier. Para 8 provides a useful text for the Solicitor-General. Para 12 sets the conditions Mr Patten must accept if the S-G's approach is to be pursued. BHP 22/6

PRIME MINISTER

THE COMMUNITY CHARGE

DECISIONS

The Solicitor General has now advised that under existing legal powers the Secretary of State for the Environment could implement what would be in effect a system of income limits. This is very surprising; but if true it makes the option of acting under existing powers, without the need for legislation, more attractive than it has seemed hitherto. Much depends on what the Solicitor General and the Secretary of State say at this meeting about how these powers could, and would, be used in practice as well as in principle. You may wish to begin the meeting by making two points:

- i. what matters is the position next April. The Government needs to be sure that local authority spending and therefore community charges can be kept down to a reasonable level and it must have the power to intervene on a large scale if necessary;
 - ii. legislation on stronger capping plus referendums has so far seemed to be the most promising route. The Group will not wish to give up that option unless they are satisfied that the new interpretation of existing powers will do the trick.
2. You may wish to begin with the Solicitor General. He says that "in principle there is no legal impediment" to the approach which he suggests. You will want to explore how robust he judges this interpretation to be in practice, and whether it has a reasonable prospect of withstanding judicial challenge: see possible questions below.
 3. You may then want to seek the views of the Secretary of State for the Environment. He has been very anxious to avoid legislation. If you agree to his acting under existing powers, you will want his clear assurances on:

- i. the July package. In his announcement next month Mr Patten could be asked to include a clear statement of intention about how he intends to use his capping powers next March if local authorities set their budgets too high;
- ii. use of the powers next March. The Group will wish to be clear that Mr Patten will be prepared in practice to cap local authorities on a large scale if they exceed the increases implied by the Solicitor General's approach, in order to bring down community charges and secure savings in expenditure.
4. You may then want to bring in the Chancellor of the Exchequer and the Chief Secretary, both of whom have previously argued for legislation. They are likely to be particularly concerned about the implications for the AEF settlement. Mr Patten and Mr Lamont are still a long way apart, both on the overall level of grant and the package of measures to help individuals: Mr Lamont has offered a total envelope of £1.5 billion, whereas Mr Patten wants £2.9 billion (£2.5 billion for grant and £384 million to help individuals). Depending on the discussion you might try to bring the two sides together on a settlement around a total envelope of up to about £2 billion or at a squeeze £2.2 billion (including help for individuals in both cases); or you might prefer to invite the Secretary of State for the Environment and the Chief Secretary to conclude urgently their negotiations by the end of the week with a view to their putting an agreed paper to E(LG) on Tuesday week, 3 July.
5. Finally there are the next steps. Time is running short for the July announcement and you will wish to bring the service Ministers into the discussion. The next step therefore is for Mr Patten to put a paper, agreed with the Treasury, covering the whole package including the AEF settlement, to E(LG), probably on Tuesday 3 July. This meeting could also consider whether the introduction of the Government's reforms on community care should be delayed.

MAIN ISSUES

The Solicitor General's advice

6. The Solicitor General's advice relates mainly to the use of the second limb of the existing power (section 100(1)(b) of the 1988 Act) which allows capping where there is an excessive increase in an authority's precept or demand on the collection fund. He says that the Secretary of State could promulgate in advance (eg in July) a policy about what increases he would consider excessive for different types of authority. For example, his policy could be that:

i. authorities spending below SSA in 1990-91 would face no restrictions;

ii. authorities spending between SSA and SSA + 5% would be limited to a standstill in real terms: that is, to an increase which allowed fully for inflation and new burdens (eg 10%);

iii. authorities spending between SSA + 5% and SSA + 12.5% would be limited to a lower figure requiring real cuts in real terms (eg 8%);

iv. authorities spending above SSA + 12.5% would be limited even more severely, eg to a 5% increase in cash terms.

7. Where an authority exceeded the limit implied by this policy, it would be open to the Secretary of State to impose a cap, although he would have to consider whether this was the right course in the light of all the circumstances prevailing next Spring, including the circumstances of individual authorities.

8. The Solicitor General's advice is very surprising, given the caution which the Government's legal advisers have been pressing on you in relation to 1990-91. (A new example is Mr Patten's minute of 20 June, saying that he has been advised not to risk imposing conditions on authorities whose caps he has varied.) You will therefore want to test the Solicitor General's advice, for instance by asking:

i. how far is the approach dependent on the Divisional

Court's ruling that "excessive" means simply an amount which is larger than the Secretary of State believes it ought to be? Would the approach collapse if this interpretation were amended on appeal?

ii. what would happen if the average spending increase were again 14% or more, as in 1990-91? Could the Courts really be persuaded that every authority increasing by more than 10%, 8% or 5% (depending on its position in relation to SSA), had made an "excessive" increase?

iii. does it really get away from the risk of legal arguments about the accuracy of SSAs? For example, an authority 1% above SSA could claim that it would have been exempt from capping if its SSA had been just 1.1% higher;

iv. what has happened to the earlier advice from his office that there needs to be, not only an allowance for inflation, but a margin above it "to make reasonable allowance for inaccuracy in the inflation forecast and for the fact that the circumstances of local authorities may reasonably be expected to change during the year"?

v. is there not a danger that the courts will hold that the Secretary of State is trying to introduce a system of "targets" or "income limits" by stealth without express statutory authority (which has always been held to be necessary in the past), and therefore exceeding his powers?

9. You will want to consider how far to press these questions. The fact is that the regime proposed by the Solicitor General is close to the income limits system which you wanted earlier in the discussions. One course of action would be to seek Mr Patten's agreement that he will proceed in this way, and then consider whether to ask for a rigorous explanation of the legal issues. Alternatively you could agree that the Government should be prepared to introduce legislation next May if the Solicitor General's interpretation of the law were to be overthrown by the

Courts at that time; it would then be clear what legislative changes were needed to remedy the situation.

Mr Patten's position

10. Mr Patten has been asked to exemplify the Solicitor General's approach. When he circulates the new figures to colleagues early next week he may give some indication of his own views. But we do not yet know what approach he is likely to take.

11. The risk is that he will say that the new advice shows that there is no need for legislation, but that the Government should wait until next Spring before deciding what use to make of the existing powers. That would surrender the potential deterrent effect of an early announcement, and provide no assurance that the powers would be used robustly in practice. Indeed, he might be opposed to using capping powers more extensively than he has used them this year, as a matter of principle. You might think it timely to remind him about what he himself said in a paper of 23 April, only two months ago:

"..there remains the danger that extra grant would leak into higher spending, so I would also propose that we should take enhanced powers for exemplary capping. I envisage that these might in due course catch about 50 authorities which we would be able to retain within the scope of capping for several years, until they reduced their expenditure to a reasonable level." (para.52)

12. You may want to insist that the price for giving up the legislative option must be:

i. an announcement in July that the Government will be adopting the Solicitor General's approach. This would need to state what the permitted increases for different types of authority would be;

ii. an assurance about the use of the powers next Spring. You will want to be clear that Mr Patten will be prepared to

cap a large number of authorities if they exceed the specified limits, and that he will make the necessary arrangements in his Department to do so. This may have substantial manpower implications.

AEF settlement

13. Mr Patten and the Chief Secretary will be reporting on their discussions about AEF and TSS. They are still a long way apart. Mr Lamont has offered AEF of £1.5 billion above baseline (including any help for individuals - see below). Mr Patten wants £2.5 billion (excluding help for individuals).

14. The additional figures Mr Patten has been asked to put in should help you to judge the implications of different AEF figures for the likely level of community charges under the Solicitor General's approach. In the light of that, you might wish to give a general steer about the outcome you want, and then if there is no sign of agreement ask Mr Patten and Mr Lamont to meet again urgently to agree an acceptable package.

Help for individuals

15. Mr Patten and Mr Lamont have also discussed help for individuals. Mr Patten is bidding for a package of £384 million comprising the following:

i. extending the life of the transitional relief scheme, and maintaining entitlements at present levels for 1991-92 and 1992-93. The cost would be about £90m in 1991-92. This has already been agreed in principle;

ii. extending transitional relief to all disabled people, at a cost of about £25m in 1991-92. You may have doubts about the case for another concession to the disabled;

iii. reducing the threshold for transitional relief from £3 to £2 per week. This would cost £220m per annum, and seems very poor value for money, since it would simply give an extra £1 per week to every recipient of transitional relief;



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- iv. limiting the withdrawal of the area safety net to a maximum of £25 per adult. This would cost £24m in 1991-92;
- v. reducing the assumed income from savings in calculating community charge benefits, at a cost of about £20m per annum. The group have been doubtful in the past about the merits of further changes in benefits;
- vi. other action on the standard community charge, to close the gap for students between school and university, and to provide additional transitional help to small composite hereditaments (eg small shops with living accommodation). The costs are small, and fall mainly on other chargepayers or business ratepayers rather than the Exchequer.

16. Mr Patten's package would cost £384m in 1991-92. But if options ii., iii. and v. were dropped, the result might be an acceptable package at a cost of just over £100m. You might ask the two Ministers to consider whether that provides a way forward.

Next Steps and community care

17. If the meeting is successful, you might ask Mr Patten and Mr Lamont to bring forward an agreed joint paper to E(LG), perhaps on Tuesday 3 July.

18. At E(LG) you will need also to take a final decision on whether to delay the implementation of the community care reforms. Mr Clarke will no doubt wish to go ahead, particularly since the Solicitor General's advice provides a way of constraining local authority spending. On the other hand, introducing this substantial new burden would make it much more difficult to impose challenging limits on authorities' spending increases, because all social services authorities would need extra headroom to cope with community care. You may therefore feel that it would still be right to defer implementation.

R T J WILSON
22 June 1990

R.T.J.