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ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

PRIME MINISTER

2(A-B)

COMMUNITY CHARGE

1. Your Private Secretary's letter of 2 July records your wish that I should consider whether my approach to the more extensive use of existing capping powers implied any legal constraints on setting the TSS and any gap between TSS and the outcome of actual expenditure after capping. You also asked whether any legal considerations suggested that a gap larger than £1 billion between TSS and the actual outcome was necessary or desirable to avoid the risk of successful legal challenge.

2. The key point to have in mind is that the TSS and the SSAs which derive from it should be set at a level which genuinely represent the amount which the Secretary of State considers appropriate for all local authorities to incur to finance a standard level of service. Insofar as there is a gap between TSS and the actual outcome, that gap derives not from any artificial lowering of TSS but from a policy decision not to apply powers to their theoretical maximum (no doubt that decision will be informed by consideration of the points raised in paragraphs 8 and 9 of my minute to you of 19 June) warning of the dangers of applying a capping scheme too rigourously.

3. Moreover, to reduce TSS in order to leave an apparent margin would amount to a distortion of the system. The TSS has to be the amount of revenue expenditure which the Secretary of State considers appropriate for all local authorities in England to incur to finance a standard level of service. If the courts perceive that the TSS has been set artificially low, challenges to the SSA could well be successful. Any deliberate gap between TSS and the actual likely outcome could not be referred to (since it would immediately suggest that the TSS was wrongly set) and would therefore bring no presentational advantages.

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4. In my minute of 19 June I postulated that the Secretary of State might adopt a policy whereby local authorities were to observe a standstill in their expenditure for 1991/92. I suggested that it would be difficult for a local authority to persuade a court that such a policy was one which no reasonable Secretary of State could adopt, but that this was on the assumption that the TSS would be set at an amount which would properly reflect increases in local authority costs plus the cost of new burdens.

5. Ultimately, the scheme of capping (whether on excessive amounts or on year-on-year increases) depends on the TSS. If it is set deliberately low, an argument might run that low-spending authorities had been brought within the designation principles (by means of low SSAs) as a means of making the savings which, for practical reasons, could not be exacted from high-spending authorities.

6. My conclusion is that the TSS must be set in a free-standing exercise so that it genuinely represents the amount the Secretary of State considers appropriate for all local authorities to incur to finance a standard level of service. In my view the Secretary of State should not seek to reduce TSS so as to produce an apparently wider margin for exercise of his capping powers. In so doing, he would notionally be reducing TSS below the amount he considered appropriate for a standard level of service.

7. As far as year-on-year capping is concerned, there is in my view no particular legal advantage to be gained by increasing the gap between TSS and the outcome on actual expenditure. Rather to the contrary, if the TSS is set low, it might undermine the legitimacy of policies established by the Secretary of State with respect to levels of local authority spending.

8. I am copying this to members of E(LG) and to Sir Robin Butler.

CPi

APPROVED BY THE SOLICITOR GENERAL
AND SIGNED IN HIS ABSENCE

4 July 1990