



A.S.C. N.

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SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

W. 9
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COMMERCIALISATION OF GIBRALTAR DOCKYARD

I heard that the Lord Chancellor had expressed views on the law on your minute of 15 July to the Secretary of State for Defence. At my Department's request, I have now been provided with a copy of his letter to you of 25 July which was not copied to me. In that letter the Lord Chancellor suggests that it can be argued with some force that aid to the Gibraltar dockyard is not incompatible with the Common Market, is not contrary to Article 92 and does not have to be notified to the Commission under Article 93.

I do not share the Lord Chancellor's view that there is a good argument that the Treaty provisions on state aid do not apply to Gibraltar. I cannot accept that, given the terms of the Act of Accession, it follows that because Gibraltar is outside the customs territory of the Community the competition provisions do not apply. The Lord Chancellor's advice certainly runs counter to previous studies made by officials of the extent to which the Treaty provisions apply to Gibraltar.

As I indicated in my earlier advice, a copy of which is attached to this minute, I have not been able to reach a view on the material available to me as to whether there are sound legal arguments for not notifying the Commission. My first reaction was certainly that there were not but I would need further amplification of the paper attached to your minute of 15 July to the Secretary of State for Defence if a considered view were required.

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I am copying this minute to the Prime Minister, other members of OD, Timothy Raison and Sir Robert Armstrong.

MT

LAW OFFICERS' DEPARTMENT

7 September 1983

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01 5 7641 Ext. 3020

Communications on this subject should
be addressed to
THE LEGAL SECRETARY
ATTORNEY GENERAL'S CHAMBERS

ATTORNEY GENERAL'S CHAMBERS,
LAW OFFICERS' DEPARTMENT,
ROYAL COURTS OF JUSTICE,
LONDON, W.C.2.

Our Ref: 400/83/187(1of2)

8 August 1983

Private Secretary to the
Secretary of State for Foreign and
Commonwealth Affairs
Foreign and Commonwealth Office
London SW1

Dr
9/8

COMMERCIALISATION OF GIBRALTAR DOCKYARD

I have seen the letter of 25 July from the Lord Chancellor to your Secretary of State.

Unfortunately, neither Law Officer will be available until the end of this month, but I suspect that they will wish to express a view on the argument set out on pages 2 and 3 of the Lord Chancellor's letter.

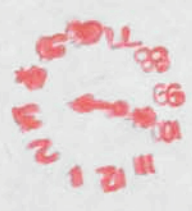
I understand that your Secretary of State himself intends to reply to the letter but is not likely to do so until next month. I also understand that Ministers are not likely to take any decisions relying on the strength of the various legal arguments until then.

I am copying this to the Private Secretaries to the Prime Minister, the Lord Chancellor, other members of OD, the Minister for Overseas Development and Sir Robert Armstrong, and also to Richards in your ECD(E), Alan Preston in the Treasury Solicitor's Department and Julian Mackenney in the Cabinet Office.

A M SUSMAN

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Gibraltar: Policy towards
Sib Pt 4



19 AUG 1983

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05 7641 Ext. 3229

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ATTORNEY GENERAL'S CHAMBERS,
LAW OFFICERS' DEPARTMENT,
ROYAL COURTS OF JUSTICE,
LONDON, W.C.2.

Our Ref: 400/83/187

26 July 1983

F Richards Esq
ECD(E)
Foreign and Commonwealth Office
King Charles Street
LONDON S W 1

F Richards,

COMMERCIALISATION OF THE GIBRALTAR DOCKYARD AND THE
EUROPEAN COMMUNITY

Thank you for sending me a copy of the Foreign Secretary's minute of 15 July to the Secretary of State for Defence concerning the commercialisation of the Gibraltar Dockyard. I have shown the minute to the Attorney General.

The Attorney General is most concerned about the suggestion in paragraph 5 of the minute and in paragraph 12(a) of the paper by officials that we should decide now to defy an eventual judgment of the European Court. He questions whether the broader implications of defying a judgment of the European Court have been taken fully into account and whether it is really necessary to take such a decision at this stage. He acknowledges that, in the context of withholding our budgetary contributions, we have contemplated the possibility of defying the judgment of the European Court. But that is a very exceptional case indeed and the Attorney hopes that before a final decision is taken to defy the Court's judgment in this case, full account will be taken of the drastic nature of such a course of action, of the effect it will have on the UK's credibility before that Court and other international tribunals and of our interest in ensuring that other Member States comply with their Community obligations and with judgments of the European Court and in particular do not grant illegal state aids. As to the need to take a decision on this question at this juncture, the Attorney points out that much will depend on the turn of events, the timing of the grant of aid and the precise terms of the judgment. It is, of course, possible that, after the European Court has given its Judgment, an individual will bring a case before the Courts in Gibraltar to "enforce" that judgment, seeking a declaration that the aid is unlawful. The Attorney considers it totally unacceptable that HMG or

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the Government of Gibraltar should, besides flouting the judgment of the European Court, defy the judgment of a domestic court.

The Attorney accepts that the question of whether to notify the aid or not is primarily one of policy. He has not received sufficient information about the aid to form a judgment as to whether it falls within Article 92(1), i.e. whether any of the defences set out in paragraph 15 of the paper by officials are likely to succeed. That paper, however, fails to identify certain additional risks which are run in not notifying the aid (assuming that it is indeed notifiable). The European Court has held that the last sentence of Article 93(3) (requiring Member States not to put a measure into effect until the Commission has expressly or implicitly approved it) has direct effect. This means that the aid is unlawful in domestic law if it is not notified. That has two consequences. First, the aid could conceivably be challenged at any time in the courts of Gibraltar (although probably not in the UK courts) by a competitor. Secondly, it may be of concern to the PAC that money is being expended on a project for which there is no lawful authority. There could well be questions in Parliament as to why we have assisted in the unlawful payment of aid by the Government of Gibraltar. The Attorney is not in a position, however, to assess the extent of those additional risks nor of the risk of the Commission seeking interim measures under Article 186 EEC.

I am copying this letter to Bill Godwin and Sophia Lambert.

*Yours sincerely,
Henry Kent
for*

M L SAUNDERS

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Lib Policy Pt 4

8 SEP 1987

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25 July 1983

Handwritten signature

Amil FCS's reg.

ML 26/7

The Right Honourable
Sir Geoffrey Howe, Q.C., M.P.
Secretary of State for Foreign
and Commonwealth Affairs
Foreign and Commonwealth Office
London S.W.1

My Dear Geoffrey:

Commercialisation of the Gibraltar Dockyard

I have read with interest your minute to Michael Heseltine of 15th July on the policy we should adopt towards notifying to the European Commission the aid we propose to grant to Gibraltar. State aids are not an aspect of Community law with which I am particularly familiar, but there are nevertheless one or two points in your minute which trouble me.

The first, which may be due to a misunderstanding, is the statement at the end of paragraph 5 of your minute that if proceedings were taken against us in the European Court it would be necessary for the investment to go ahead in defiance of the Commission and/or the Court. I can well understand that, if the Commission took proceedings against us on the grounds that in their view this aid was illegal, you would nevertheless wish to proceed with this aid unless and until there was an adverse ruling from the European Court. But what you say could be understood as meaning that you would proceed with this aid even in defiance of an adverse ruling of the Court. I presume that this is not your intention, but if it is I fear that I would see some difficulty in going along with this. The framework of any civilised society is based on obedience to the orders of the Courts; and this is all the more true in the

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case of the Community, where the Court has no means of enforcing its judgments against the Member States, and must therefore rely on the Member States themselves complying with their Treaty obligations and obeying the orders of the Court.

I turn now to the question of notification. You say that there is "just a chance" that the Commission might not notice the aid, or might choose to turn a blind eye. Although as I have said my experience in this field is limited, I find it hard to believe that there is much real prospect of this happening. Your officials have already discussed the point with those of the Commission; the aid could surely not fail to attract considerable publicity; and other countries with an interest, such as France and Italy, are likely to draw the aid to the Commission's attention. If I am right in this, our failure to notify would surely be more likely to lead the Commission to take an adverse view of this aid than if they had been informed of it in advance.

I am not for a moment suggesting that the aid should be officially notified to them under Article 93 of the EEC Treaty, for I recognise the difficulties inherent in this, the first of which is that it would constitute an implied admission that we are bound by the Treaty to notify to the Commission aid granted to Gibraltar. But I believe that a respectable case can be made out for saying that we are not legally obliged to notify such aid, and if there is substance in this view my inclination would therefore be to inform the Commission of the aid, to explain that this does not constitute a formal notification, and to give the reasons why in our view no formal notification is necessary.

The argument would proceed as follows. Since Gibraltar is a European territory for whose external relations the United Kingdom is responsible, there is no doubt that, in general, the EEC Treaty applies to it pursuant to Article 227(4). Moreover, Article 28 of the Act of Accession expressly provides that the Community rules on agriculture and on VAT are not to apply to Gibraltar, but says nothing about State aids.

What is however to my mind significant is that Gibraltar is not

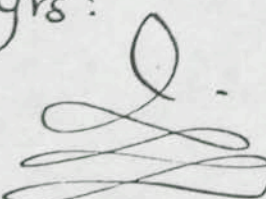
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included in the customs territory of the Community. The territorial extent of the customs union is governed by Council Regulation (EEC) No. 1496/68. In its original form this provided that the customs territory should cover the six original Member States, and in addition Monaco and San Marino. On our accession it was amended to include "the territory of the United Kingdom of Great Britain and Northern Ireland and of the Channel Islands and the Isle of Man" - but, significantly, not Gibraltar.

The reason State aids are restricted by the EEC Treaty is, of course, that they distort the free competition which is at the basis of the customs union. Thus Article 92(1) provides that any State aid is incompatible with the Common Market "insofar as it affects trade between Member States". Although Gibraltar is to be treated as if it were part of a Member State for most purposes, a State aid to the dockyard cannot affect trade between Member States, since Gibraltar is not part of the customs union. To my mind it can therefore be argued with some force that such a State aid is not incompatible with the Common Market, is not contrary to Article 92, and therefore does not have to be notified to the Commission under Article 93.

Though I have described this argument as plausible, I recognise that strong arguments can be mounted the other way. You may nevertheless like to consider whether, rather than not notifying this aid to the Commission at all, it might not be preferable to inform the Commission of it, explaining at the same time that there is in our view no legal requirement to notify the aid in accordance with Article 93. The legal argument would, of course, be buttressed by the political arguments which are put forward in the official paper.

I am copying this letter to the Prime Minister, other members of OD, Timothy Raison and Sir Robert Armstrong.

Yrs:


26 JUL 1983

