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Treasury Chambers, Parliament Street, SW1P 3AG

N.B.P.R.

R Bone Esq
Foreign and Commonwealth Office
Downing Street
LONDON
SW1

A.S.C. 15/3

14 March 1984

Dear Mr Bone,
Attached

INTEREST ON NON-PAYMENT OF ADVANCE OF OWN RESOURCES IN 1983

On 6 January Mr Tugendhat wrote to Sir Geoffrey Howe about a claim for interest on an advance of own resources which the UK did not pay last May because of the election.

... Copies of this letter and the draft reply which the Economic Secretary has agreed should be sent by our Permanent Representative are attached. The reply is consistent with advice from the Attorney General in May 1983 that there is no obligation to make an advance under the own resources regulation; and that we should make no concession until the Court rules otherwise.

The next stage in the proceedings is for the Commission to consider in the light of this response to its "letter of action" whether to deliver a reasoned opinion. It is only if we do not comply with that opinion that the Commission may bring the matter before the Court of Justice. You may nevertheless wish to draw the Foreign Secretary's attention to the reply which was drafted by the Treasury Solicitor after discussion with officials in EQO(L).

I am copying this letter to Mr Coles (NO.10), Mr Williamson (Cabinet Office), Mr Steel (Attorney General's Chambers), Mr Preston (Treasury Solicitor's) and Mrs Duncan (Lord Advocate).

Yours etc,
A M Ellis

A M ELLIS
Private Secretary

LEPC



Foreign and Commonwealth Office

London SW1A 2AH

21 March 1984

A.F.C. 2/3

f.a.

Dear Sir,

Interest on Non-Payment of Advance of Own Resources in 1983

Thank you for your letter of 14 March enclosing a draft reply to Mr Tugendhat's letter of 6 January to Sir Geoffrey Howe about the Commission's claim for interest on an advance of own resources which the UK did not pay last May because of the General Election. The Foreign and Commonwealth Secretary is content that this reply should be sent by Sir Michael Butler.

On the question of timing, I understand that it was agreed between officials that the reply should not be sent until today in case other Member States get wind of our detailed arguments against the binding nature of Article 10(2) of the Own Resources Decision before the advances requested for 30 March have been paid, thus frustrating our refunds. (I understand that the Commission agreed that we could delay our reply until 21 March without weakening our position but that after that we would need to seek a form of extension of the time limit.) In the light of the outcome of the European Council we do not consider that the reply need be further delayed.

I am copying this letter to John Coles (No 10), David Williamson (Cabinet Office), Henry Steel (Attorney General's Chambers), Mr Preston (Treasury Solicitor's) and Mrs Duncan (Lord Advocate's Office).

Yours sincerely,

(R. B. Bone)
Private Secretary

A M Ellis Esq
HM Treasury

22 MAR 1991



DRAFT LETTER TO THE COMMISSION

1. I have the honour to refer to your letter of 6 January 1984 to the Secretary of State for Foreign and Commonwealth Affairs requesting payment of interest of £2,003,815.21 to which my authorities have given careful consideration and have instructed me to make the following observations.

2. Clearly, the essential question is as to the true interpretation of Article 10(2) of Council Regulation 2891/77. As to that it is immediately apparent that the text in all Community languages is precatory^(“precatif”) and not apt to create an obligation. (The difficulty which this creates for the Commission is reflected in the second paragraph of your letter: it is not possible on a natural use of the words to talk about the implementation of an invitation by the person to whom the invitation is addressed.) That Article 10(2) is precatory is confirmed in several ways.

3. First, the language in Article 10(2) provides a striking contrast to the language of Article 11(2) of Council Regulation 2/71. In the view of the United Kingdom, any doubt as to the proper interpretation of Article 10(2) is immediately dispelled on a comparison with the earlier legislation, since it is impossible to impute to the legislator who substitutes precatory words for mandatory words any intention other than to stop short of creating an obligation.

4. Secondly, an examination of the travaux préparatoires supports the view that Article 10(2) was not intended to be mandatory.

5. Thirdly, the language of Article 10(2) is in direct contrast to the wording of Articles 10(1), 10(3) and 12. The draftsman has clearly used a consistent and different formula where the intention is to impose an obligation. Had it been the intention to impose an obligation to respond to an invitation by the Commission under Article 10(2), it is quite clear how the provision would have been drafted. In this connection the United

Kingdom notes that the word "invites" is used in non-binding Community acts, as, for instance, in the Commission's proposed Recommendation on Emergency Health Cards and the Commission's proposed Resolution on local employment initiatives.

6. The United Kingdom does not overlook the point you make in the first sentence of the fourth paragraph of page 2 of your letter, that Regulation 2891/77 concludes with the usual formula drawn from the material provisions of the Treaties concerning the legal character of the Regulation. But those provisions, Article 189 EEC for example, do not mean that every provision of every regulation creates an obligation. Those general words cannot override the natural meaning of the words used in Article 10(2), which in the view of the United Kingdom serve to establish the circumstances in which the Commission may ask for an advance if it considers that circumstances have arisen in which it is necessary for it to do so.

7. As to the point made in your next paragraph, the juxtaposition of paragraphs 1 and 2 of Article 10 is in the United Kingdom's view immaterial to the question whether Article 11 is applicable to paragraph 2. As already stated the significantly different wording of paragraph 2 indicates that Article 11 applies only in respect of the time limit laid down in Article 10(1). This view is confirmed by the fact that, when a Member State accepts an invitation to make an advance under Article 10(2), the amount entered in the Commission's account is an estimate based on information available 5 days earlier, by contrast with the actual amount due under Article 10(1). Thus, in a subsequent month the United Kingdom estimates were about £4m. more than eventually became due, and yet the United Kingdom has no claim for interest on the overpayment. But another Member State may have paid sums substantially less than eventually became due and yet would not, it seems, be asked to pay interest on the underpayment. This demonstrates that the application of Article 11 to the non-payment of advances would be arbitrary and inequitable.

8. The Commission's observation that, on a more general level, its contentions reflect the development from a Community budget

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based almost entirely on expenditure to one in which increasing emphasis is being given to income is not understood. It has always been the case that, as Article 199 EEC makes clear, the revenue and expenditure shown in the budget must be in balance. Furthermore, the position on expenditure and revenue has not changed since the Treaty of 22 July 1975 and the full application of the own resources system from 1978. Article 10(2) of Regulation 2891/77 clearly took account of the nature of the Community budget and the developments since its predecessor regulation, Regulation 2/71.

9. In view of the above arguments, the United Kingdom finds inescapable the conclusion that by making the entry in respect of the resources established in April on 20 June 1983 the United Kingdom has fully discharged its obligations under the Regulation and the conditions for the application of Article 11 of that Regulation are not met.

10. In the absence of a legal obligation to make that advance, it will be apparent that the United Kingdom's constitutional difficulties are highly material. It would not have been proper for the United Kingdom government to make a voluntary payment without Parliamentary approval. The United Kingdom government would have been ready to recommend to Parliament approval of the requested advance. However, the dissolution of Parliament was announced on 9 May prior to a general election and there was insufficient time to implement the special parliamentary procedure. As evidence of its good will on the general issue of advances in 1983, the United Kingdom points out that it instituted the procedures considered appropriate in the circumstances immediately the new Parliament had assembled after the general election in order to comply with the Commission's request for advances due on 20 June and likewise complied with all subsequent requests from the Commission.

The Vice-President

Brussels, 6. I. 1984
SG(83) D/ 124

Sir,

The Commission informed the United Kingdom authorities in its telex No. 71299 of 28 April 1983 of its decision to invoke the provisions of Article 10, paragraph 2 of Council Regulation No. 2891/77 of 19 December 1977 which states that, "if necessary, Member States may be invited by the Commission to bring forward by one month the entering of resources other than VAT resources on the basis of the information available to them on the 15th of the same month."

The United Kingdom did not implement this invitation to enter to the credit of the Commission's account on 20 May 1983 the resources established in April. These resources, amounting to UKL 115,089,307.99, were entered one month later on 20 June 1983.

Article 11 of Regulation 2891/77 states that:

"Any delay in making the entry in the account referred to in Article 9(1) shall give rise to the payment of interest by the Member State concerned at a rate equal to the highest rate of discount ruling in the Member States on the due date. That rate shall be increased by 0.25 of a percentage point for each month of delay. The increased rate shall be applied to the entire period of delay."

The number of days delay amounted to 31 and the highest rate of discount ruling in the Member States on the due date was 20.5 % (Bank of Greece). The calculation of the interest due is thus as follows:

$$\text{UKL } 115,089,307.99 \times \frac{31}{365} \times \frac{20.5}{100} = \underline{\underline{\text{UKL } 2,003,815.21}}$$

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The Right Hon. Sir Geoffrey HOWE, Q.C., M.P.
Secretary of State for
Foreign and Commonwealth Affairs
Foreign and Commonwealth Office
Downing Street
LONDON SW1A 2AL

In his letter of 8 July 1983 to the Permanent Representative of the United Kingdom to the European Communities, the Director-General for Budgets requested him to arrange for the United Kingdom authorities to credit the account EEC 1 opened in the name of the Commission with H.M. Treasury with the sum of UKL 2,003,815.21 as soon as possible.

The United Kingdom authorities rejected the Commission's request in a reply from the Permanent Representative to the Director-General for Budgets on 16 September 1983.

I regret that the Commission is unable to accept the two particular arguments put forward in that letter.

In the first place, Regulation 2891/77 states in fine that "This Regulation shall be binding in its entirety and directly applicable in all Member States". The dissolution of the United Kingdom Parliament is therefore not relevant as regards its application.

In the second place, as Article 10, paragraph 1 and paragraph 2 of the Regulation are intimately related, the provisions of Article 11 are applicable to paragraph 2 as well as to paragraph 1. That being so, it cannot be left to the individual Member State to decide at its entire discretion whether and how Article 10, paragraph 2 is to be applied.

On a more general level, this position reflects the development from a Community budget based almost entirely on expenditure to one in which increasing emphasis is being given to income.

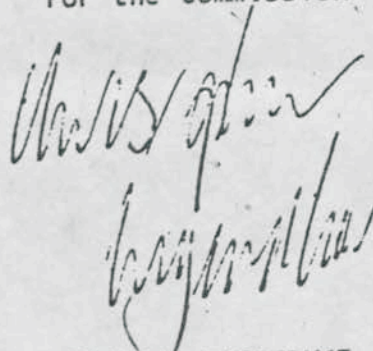
In the light of the above, the Commission would request the United Kingdom authorities to review their position and to enter the sum of UKL 2,003,815.21, representing the interest for late payment into its account EEC 1 with H.M. Treasury within two months of the receipt of this letter.

In the absence of the United Kingdom Government complying with this request, the Commission invites it in accordance with the provisions of Article 169 of the EEC Treaty to submit its observations within the same period of time.

The Commission also reserves the right to deliver the reasoned opinion provided for in Article 169 of the EEC Treaty after having studied these observations. The Commission similarly reserves the right to deliver such an opinion if the observations do not arrive in the required time.

Yours faithfully,

For the Commission

A handwritten signature in dark ink, appearing to read 'Christopher Tugendhat', written over the printed name.

Christopher TUGENDHAT

15 MAR 1984

