CC NO

Prime Minister

You will wish to know how it is proposed to handle these difficult issues. CDP to note

Agree to the course suggested by Mr. Stewart i.e. primary legislation with payments under the IGA by a winter supplementary estimate? CDP 6/5

The LPS + Lord Privy Seal will not be very pleased. But it is very controversial - I should prefer it to be introduced nearer the beginning of July so that we can perhaps consult 2nd readings Committee Stage

Treasury Chambers, Parliament Street, SW1P 3AG

The Rt Hon John Biffen MP
Lord Privy Seal
Lord Privy Seal's Office
Whitehall
LONDON SW1A 2AT

30 April 1985

Dear John, before writing

As you know, the recent March meeting of the European Council reached agreement on the substance of the new Own Resources Decision (ORD), which will provide for the Fontainebleau mechanism to abate our net contributions to the Community Budget and for the increase in the VAT ceiling to 1.4%. The formal adoption of the ORD for recommendation to Member States is expected to take place in the near future. In addition, the Budget Council has now agreed on a second Inter-governmental Agreement (IGA) to finance the 1985 Budget overrun.

We now need to decide as soon as possible on the means of securing Parliament's agreement to the ratification of the ORD and to the implementation of our payments under the second IGA.

Geoffrey Howe, Malcolm Rifkind and I have been considering the available options. For the reasons explained below we have concluded that primary legislation is necessary to ratify the ORD and we think it sensible to make provision for our payments under the IGA in the same legislation. What would be involved is a short two-clause Bill, though given the contents it will be a highly controversial one. Unfortunately there is a degree of urgency. The ORD provides for the payment of our 1000 mecu abatement in respect of 1984 on the revenue side of the 1985 budget. If there is to be any prospect of our receiving the 1000 mecu this year, we should aim to ratify the ORD by the end of November.

The purpose of this letter is to let you know my views about the Bill and its timing.

Approving the ORD

You may recall that we had contemplated obtaining approval of the ORD by an Order in Council under Section 1(3) of the

European Communities Act (ECA) 1972, designating it as a Community Treaty. (The present ORD agreed in 1970 was listed as a Community Treaty in the ECA when that was passed). We have recently been advised by the Law Officers (see Annex A below), however, that the form in which the ORD emerges from the Council means that it is not a Treaty until it has been ratified by all Member States. Designating it as a Treaty by a Section 1(3) Order in advance of ratification would therefore run the risk, in any proceedings for judicial review, of being judged ultra vires. (In last year's case brought by Mr Oliver Smedley over the IGA, it was made clear that such proceedings almost certainly would be brought if an attempt were made to use Section 1(3) for the ORD). The Law Officers also feel that this is a sufficiently important measure to fall within the "significant and substantial" category of cases where the Government undertook in 1972 not to use Section 1(3). We therefore feel that we have no option but to go for primary legislation. The actual provision in the Bill would be extremely simple, as it will only need to add the ORD to the list of Community Treaties under Section 1(2) of the ECA.

Approving the IGA

As regards the IGA there are in theory three possible options:-

(a) an Order under Section 1(3) of the 1972 ECA - the procedure we proposed to follow last year;

(b) a Supplementary Estimate (normal or Special) and a Consolidated Fund Bill (normal or Special) - the procedure actually used in January this year on the 1984 IGA;

(c) primary legislation in the same bill as the ORD in one of the two ways discussed below.

The first of these options should, we think be ruled out, given the degree of controversy it provoked last year and the risk of a further court case. Given the requirement for a Bill to ratify, there would be considerable advantages in using the same Bill to seek the House's authority for making our contribution to the 1985 IGA. The IGA and ORD are in effect elements in a single package assuring the future financing of the Community and the UK's abatements in 1985 and later years. And it will be much easier to defend the IGA in the House in the context of the wider Fontainebleau package.

Moreover, this course will mean there will be no repetition of the controversy we had last year over the use of Section 1(3) for the 1984 IGA, nor will we need to take up extra Parliamentary time with a special Supplementary Estimate and Consolidated Fund Bill as we eventually did last time. I recognise that any method of primary legislation for the IGA will make it more difficult to revert (though not impossible) to an alternative method were we ever to have to seek approval for another one. I very much hope that this will never arise, but in any case I think we would have a good argument for

primary legislation this year because of the close link between the provisions of the ORD and the IGA.

I understand that there are two methods of using primary legislation to approve payments under the IGA. The first would be to add it to the list of Community Treaties under Section 1(2) of the ECA. This would mean that the payment was charged directly on the Consolidated Fund. The other would be to provide for the Government to make the payment out of moneys provided by Parliament. This would require a Supplementary Estimate. Both would in their ways be controversial and the choice between them is finely balanced. I set out the main considerations below.

Section 1(2) method

Making the IGA a Community Treaty is likely to arouse opposition because it will mean that, although there will still be an opportunity to debate the IGA itself, the House will have no opportunity to consider an Estimate for the money - one of the reasons last year for objecting to the use of Section 1(3). Terence Higgins and the Treasury Committee would probably object strongly to this, although they would still be entitled to call for evidence from officials and even Ministers. On the other hand, this route would fit well with the Court's ruling last year that the IGA was a Community Treaty.

Supplementary Estimate

The Supplementary Estimate procedure would be less controversial, although it would raise an awkward question of timing. There is a case for presenting the Estimate with the Summer Supplementaries before the primary legislation is passed, rather than waiting until the Winter Supplementaries in November, so as to give a clear signal now that we are getting on with the IGA and not trying to establish a direct linkage with our 1000 mecu abatement. Unless we can show reasonable progress over the IGA, there is a risk that other member states might deliberately delay ratification of the ORD, thus jeopardising payment in 1985 of the 1000 mecu. A Winter Supplementary Estimate that could not be paid until December might be regarded as a delaying tactic in some quarters.

On the other hand, presentation of a Summer Supplementary before the primary legislation is approved would be irregular and controversial. In addition, given the hostility in the House to both the IGA and the ORD, I see considerable political difficulty in presenting a Supplementary in the Summer. We may still be having problems with the CAP price-fixing and the 1985 Budget; and there are likely to be substantial difficulties with the 1986 Budget too. This could make a difficult background against which to seek the approval of the House for a Summer Supplementary Estimate in advance of the enabling legislation. As for the other member states, we now know that the Germans do not propose to ratify the ORD until December; so that we face the risk of delay over the ORD anyway.

I would, therefore, prefer to present a Winter Supplementary Estimate in November, but I should be grateful for your views on this, as on the timing of the Bill generally. On the latter,

our objective must be to secure ratification before the end of November, in order not to put at risk the payment of our 1000 mecu before the end of 1985. On the other hand we cannot introduce the Bill before the 1985 Budget containing our 1000 mecu abatement in satisfactory form is finally adopted. Assuming this condition is met, I would favour presenting the Bill before the Summer Recess, but taking it through both Houses thereafter in order to ensure we meet the end November deadline and as an earnest of our committment to secure the passage of the ORD and IGA in good time.

I should add that there would, of course, be no question of making any payment until the ORD/IGA Bill had received Royal Assent.

Enlargement

You will recall that the FCO have already sought leave to introduce in November the necessary legislation to ratify the Accession Treaties with Spain and Portugal. It would have been convenient to include all three measures in one Bill, and we have looked into this possibility. We have had, however, to conclude that the timing precludes this. We cannot afford the further risk to our 1000 mecu that delaying the introduction of the ORD/IGA legislation until November would present. I understand also that putting all three instruments in one bill would considerably increase the potential scope for amendments. This is something we clearly wish to avoid.

Departmental Responsibility

Since the ORD was negotiated in the Foreign Affairs Council, Geoffrey Howe might wish to participate in the proceedings on the Bill if the authority of a Cabinet Minister seems necessary; but the IGA provision obviously falls to the Treasury and I think responsibility for the Bill clearly needs to be shared between FCO and Treasury Ministers.

I am sending copies of this letter to the Prime Minister, Willie Whitelaw, Geoffrey Howe, Michael Jopling, Grey Gowrie, John Wakeham, Michael Havers, Patrick Mayhew, Kenneth Cameron, Bertie Denham, Sir George Engle and Sir Robert Armstrong.

Yours ever

Ian

IAN STEWART

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ANNEX 1

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Correspondence 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.

Miss J L Wheldon
The Treasury Solicitor
Queen Anne's Chambers
28 Broadway
London SW1H 9JS

3 April 1985

Dear Janet,

NEW OWN RESOURCES DECISION: METHOD OF IMPLEMENTATION

The Attorney General, the Lord Advocate and the Solicitor General for England and Wales have considered the joint submission attached to your letters to Douglas Duncan and me. They advise strongly against the use of Section 1(3) of the European Communities Act 1972 in order to implement the new Own Resources Decision for the following reasons. First, there are serious doubts as to the legality of an Order made under Section 1(3) to implement the new Own Resources Decision. It cannot be argued with any conviction that the stage of action in the Council would amount to an "entering into" the Agreement by the UK. The only other argument to support the vires of a Section 1(3) Order in these circumstances is that developed in paragraphs 11 to 14 of the joint submission, namely that it is entirely proper for a Section 1(3) Order to look forward to the entry into a Treaty by the United Kingdom. The Law Officers are far from confident that a court, following usual canons of statutory construction, would be prepared to accord to Section 1(3) this extensive interpretation. Secondly, the Law Officers consider that the new Own Resources Decision could easily be represented as a "significant or substantial" development falling within the "assurance" given to the House in 1972 by the then Solicitor General. Finally, the Law Officers are of the opinion that, in the light of the Smedley case last year, there is a very real risk of litigation if a Section 1(3) Order is made and that it is far from certain that the Government would be successful in such litigation.

I am copying this letter to Bill Godwin, Douglas Duncan and Martin Eaton.

Yours ever,

M L SAUNDERS

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