

Confidential Filing

Commission Directive under Article 90 of
the Treaty of Rome.

EUROPEAN POLICY

September 1980

Referred to	Date	Referred to	Date	Referred to	Date	Referred to	Date
<u>18.7.80</u>							
25.8.80							
10.9.82							
<p>PREM 19/746</p>							



JU721

Secretary of State for Industry

Prime Minister ②
ms 24/9
DEPARTMENT OF INDUSTRY
ASHDOWN HOUSE
123 VICTORIA STREET
LONDON SW1E 6RB
TELEPHONE DIRECT LINE 01-212 3301
SWITCHBOARD 01-212 7676

10 September 1982

The Solicitor General
Royal Courts of Justice
London WC2A 2LL

Dear Ian, *mt*
COMMISSION DIRECTIVE UNDER ARTICLE 90 OF THE EEC TREATY: CASE
190/80 UK v COMMISSION

Your note to the Prime Minister of 17 August refers.

2 I of course welcome the implications of the European Court of Justice's verdict in this case. The Commission has made much of the Directive's potential and I am hopeful that having fought so hard for it they will prove equally assiduous in its application.

3 The relative transparency of our own financial relations with public sector enterprises has always suggested that we had little to fear from the Directive. The same cannot be said of others, who have so far successfully frustrated Commission efforts to scrutinise their practices. While it is difficult at this stage to assess what use the Commission will make of the Directive, it certainly provides additional scope for unravelling the whole question of French and Italian assistance to their public sector industries. The Italian plea that subventions to their state holding companies are purely capital injections and not subsidies will now be more difficult to sustain as a reason for withholding information.

4 The Commission has never made any secret of the fact that the Directive was primarily aimed at France and Italy. The task will not be an easy one but I will be looking, in the months ahead, for evidence of a Commission resolve which will show our textile and other industries that the problems of which they have complained for so long are being tackled.

5 I am copying this to the Prime Minister, Cabinet colleagues and the Lord Advocate.

Your ever
Ratcliff

Ferris Pal., Sept '80.

Article 90 of the
Treaty of Rome.



Evans
H

10 DOWNING STREET

From the Private Secretary

25 August 1982

e

The Prime Minister has now seen the Solicitor General's minute of 17 August about the Commission Directive under Article 90 of the EEC Treaty which she has noted without comment.

I am copying this letter to Richard Hatfield (Cabinet Office).

TIMOTHY FLESHER

James Nursaw, Esq.,
Law Officers' Department.



01-405 7641 Extn

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

PRIME MINISTER

MF

Prime Minister

DF

19/8

COMMISSION DIRECTIVE UNDER ARTICLE 90 OF THE E.E.C.

TREATY: CASE 190/80 U.K. -v- COMMISSION.

You will recall that in August 1980 the Cabinet, at a meeting at which I put the case for doing so, decided to challenge the Commission's action in itself issuing a Directive under Article 90 (3) concerning the transparency of financial relations between member states and public undertakings.

The substance of the Directive was welcome to us on policy grounds but it was decided to challenge the action of the Commission in adopting it because it implied a wide legislative power in the Commission not subject to control by the Council.

The Directive was also challenged by France and Italy but the Commission was supported by Germany and the Netherlands.

The three actions have now been decided and, after speaking to the Attorney General, I am sending this minute to inform you of the result.



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The Court has dismissed all three applications, but has done so in a way which substantially alleviates our anxieties about the extent of the Commission's powers.

We argued before the Court that the apparently wide legislative power given to the Commission in Article 90 (3) must be limited by the general principle running through the Treaty that all original law-making power is vested in the Council, the Commission having only powers of surveillance and implementation. The Court, whilst not adopting that approach, nevertheless held that the power conferred on the Commission by Article 90 (3) is limited to directives and decisions which are necessary to enable the Commission to perform effectively its duty of surveillance in relation to public undertakings.

I think that the result is not unsatisfactory. Those Departments whose policy interests will be furthered by the substance of the Directive will obviously be satisfied. As to the constitutional aspects, I think it has been useful for three member governments to demonstrate clearly to the Commission that a careful watch is being kept on the use it seeks to make of its powers; whilst the ruling of the Court, far from endorsing a comprehensive legislative power



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in the Commission, confirms the ancillary nature of the Commission's role in relation to Article 90 and restricts the legislative power accordingly.

As the Lord Advocate was to be in Luxembourg for the case immediately after this one, it was agreed that he should present this case as well, rather than that two of us should go. Accordingly, I have discussed this minute with him and he confirms the views expressed in the last two paragraphs.

I am sending copies of this minute to those who were at the Cabinet meeting in question.

J.P.

SOLICITOR GENERAL,

17 August, 1982.

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PRIME MINISTER

Commission Directive Under Article 90 of the Treaty of Rome
(C(80) 53)

The question for Cabinet is whether the United Kingdom should challenge the vires of a Commission Directive in the European Court of Justice under Article 173 of the Treaty of Rome. As this is a Commission Directive, it did not have to be agreed by the Council and there is nothing any Member State can now do to stop it taking effect short of challenging its legality in the Court.

2. Any challenge has to be lodged by 22nd September. OD(E) met on 15th September but were unable to agree. The Lord President was in the chair in the absence of the Foreign and Commonwealth Secretary. The issue comes to Cabinet because no OD could conveniently be arranged in the meantime.

3. The conflict of interest mentioned in paragraph 3 of the Lord President's paper arises because:-

- (a) On the one hand it is in our interest to support a measure whose substance will enable the Commission to probe more effectively into the concealed subsidies granted by other Member States - especially Italy and France - to their public sector industries.
- (b) On the other hand it may be contrary to our interests to acquiesce in the means chosen by the Commission, since they involve an arguably improper extension of the Commission's powers at the expense of the Council and could if unchecked leave the door open to further Commission encroachment in the state aids field in the future.

The Opposition would no doubt criticise a failure of the Government to challenge an attempt by the Commission to extend its powers, especially when it might threaten the nationalised industries. The Government might wish to demonstrate its different attitude towards state aid, and the Community, by not doing so. So far, the Secretary of State for Industry (who is in the lead on the substance of the Directive), the Lord President of the Council and the Lord Privy Seal have given greater weight to the considerations of national interest in the substance of the Directive, and are therefore against a challenge. They think that British industry

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would not understand the Government objecting to a measure which might remove some unfair competition. The Chancellor of the Exchequer, the Lord Chancellor and the Solicitor General have been sceptical about the real value of the measure, are more concerned with the point of constitutional principle, and think we should challenge.

4. The Secretary of State for Trade argued against a challenge in the Ministerial correspondence, on the grounds that better enforcement of the rules of competition could only do us good, but in OD(E) he was worried about the extension of Commission competence and felt that the issue merited wider consideration. The Secretary of State for Energy has been concerned lest a later extension of the Directive to cover energy should put the affairs of BNOC under Commission scrutiny, but did not press for a challenge given that the proposed severance of the link between BNOC and the National Oil Account will lessen our vulnerability on this point.

5. Since OD(E) met it has become clear that both France and Italy intend to challenge the Directive themselves. This new factor might be a means of reconciling our conflicting national interests, since it means that the constitutional issue will be put to the Court - albeit perhaps not in precisely the form we should have chosen - without our having to run the risk of attracting criticism from British industry for mounting a challenge ourselves.

HANDLING

6. You will want to invite the Lord President to introduce his paper in his capacity as Chairman of the OD(E) meeting at which this issue was discussed.

7. It might next be helpful to ask the Foreign and Commonwealth Secretary or the Lord Privy Seal to confirm that both France and Italy have lodged a challenge, and that it is likely to cover the main constitutional point.

8. You might then direct the Cabinet's attention straightaway to the options set out in paragraph 8 of C(80) 53, taking account of the pros and cons of a challenge as summarised in paragraph 6. You might also wish to invite the Secretary of State for Industry to state the case against a challenge, after which the Lord Chancellor and/or the Solicitor General might be invited to put the dangers of letting this case go, and advise on the chances of any challenge succeeding. The Lord Advocate may take a less sanguine view on this latter point.



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9. The Foreign and Commonwealth Secretary or the Lord Privy Seal might give their views and ~~to~~ comment on the implications of a challenge for our relations with the Commission and the Community in general.

10. You might also wish to invite the views of the Chancellor of the Exchequer, the Secretary of State for Energy and the Minister of Agriculture.

CONCLUSIONS

11. Subject to the discussion you may be able to conclude that:

- (i) Option (ii) - intervention in the proceedings brought by France and Italy - is ruled out as giving us the worst of both worlds, in that it would look weak to our partners, would not avoid criticism from industry at home and yet would not give us freedom to frame a challenge in our own terms.
- (ii) The arguments for and against a direct challenge are finely balanced, but given the French and Italian actions we do not need to institute proceedings ourselves in order to protect the Council's position.
- (iii) We should therefore opt for course (i).

(Robert Armstrong)

17th September 1980



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The Minister of Finance has received a copy of the report of the Committee on the Review of the Government's Financial Policy, dated 1977-78, and has considered it in the light of the Government's policy on financial matters.

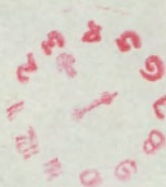
The report of the Committee is available to the public.

COMMITTEE

1. Subject to the discussion in the report, the Committee has concluded that:

- (i) The Government's policy on financial matters should be based on the principle of long-term stability and growth, and that the Government should continue to pursue a policy of fiscal prudence and restraint.
- (ii) The Government should continue to pursue a policy of fiscal prudence and restraint, and should continue to maintain a low level of government spending.
- (iii) The Government should continue to pursue a policy of fiscal prudence and restraint, and should continue to maintain a low level of government spending.

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Ministry of Agriculture, Fisheries and Food
Whitehall Place London SW1A 2HH

From the
Minister of State

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The Rt Hon Margaret Thatcher MP
Prime Minister
10 Downing Street
London SW1

17 September 1980

New Prime Minister,

COMMISSION DIRECTIVE UNDER ARTICLE 90 OF THE TREATY OF ROME

As Peter Walker is in South America at the moment, I am writing to set out the views of this Department on paper C(80)53 which is due to be taken at Cabinet tomorrow morning.

We should be very reluctant to see the UK challenge, in the European Court of Justice, Commission Directive No. 80/723 which is designed to bring greater transparency into the financial relations between Member States and their public undertakings. We should find it very difficult to explain to our industries why we were trying to prevent the Commission from taking powers which would enable them to investigate unfair financial practices by other Member States when it is exactly those practices which our industries fear are harming their commercial prospects.

We appreciate that the Directive does give rise to substantial legal and constitutional issues. But it is now known that both France and Italy have decided to challenge the Directive on broadly the same constitutional grounds as those we might put forward.

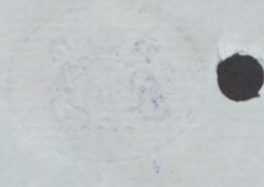
In the circumstances we strongly favour Option 8(i) in the paper ie that we should take no action against the Directive leaving the Italians and the French to bring the issues to the European Court. In this way the Court will have the opportunity to study the legal issues involved without the Government incurring the wrath of UK industries.

I am copying this letter to other Cabinet Members and to Sir Robert Armstrong.

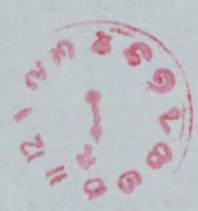
*Your ever
Alick*

Alick Buchanan-Smith

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LIBRARY



18 SEP 1980



1. The Prime Minister agreed the
Cabinet should take this matter.
Told Sir A. Armstrong's office

1

Prime Minister

Ref: A03000

MAJ

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Agree with this question
since come to Cabinet on
Thursday?

15ix

MR. WHITMORE

Since I sent you the minute about business on 12th September, a matter has arisen which will I think have to come to this week's meeting of the Cabinet.

2. The Sub-Committee on European Affairs of the Defence and Overseas Policy Committee (OD(E)) has been considering whether to challenge in the European Court the Directive adopted by the Commission under Article 90(3) of the Treaty of Rome, designed to bring greater transparency to the financial relations between Member States and their public undertakings. The issues are described in a Note by Officials circulated under cover of OD(E)(80) 23.

at hand

3. OD(E) was unable to reach a decision on this matter at its meeting this morning. The Lord President, the Lord Privy Seal and the Secretary of State for Industry were in favour of taking no action against the Directive, regarding it as, on balance, in our interests; the Chancellor of the Exchequer, the Lord Chancellor, the Secretary of State for Trade together with the Solicitor General are in favour of challenging the Directive, even though it is on the whole in our interests, because it represents an attempt by the Commission to usurp the authority of the Council of Ministers.

4. A decision has to be taken by the end of this week. Normally the matter would come to a meeting of OD; but there is no meeting of OD arranged, and it would in any case be necessary to invite a number of Ministers who are not members of OD. The agenda for the Ministerial Committee on Economic Strategy is already very crowded, and that is in any case not the right Committee for this sort of business.

5. I am therefore driven to recommend that the matter should be included on the agenda for the meeting of the Cabinet on Thursday, 18th September.

REA

(Robert Armstrong)

15th September 1980

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