

RESTRICTED



10 DOWNING STREET

From the Private Secretary

16 January 1986

ILLEGAL COMMUNITY BUDGET FOR 1986: UK ACTION

The Prime Minister has considered the Chancellor's minute of 15 January dealing with the consequences of the adoption by the European Assembly of an illegal Community Budget for 1986.

The Prime Minister agrees with the conclusions of the Chancellor's minute. She has commented that we shall need to work out a more careful line for the Parliamentary handling of the decision to pay our full contribution to an illegal Budget while legal action is in train.

I am copying this letter to the Private Secretaries to the Foreign and Commonwealth Secretary, the Legal Secretary to the Law Officers and Sir Robert Armstrong.

C D POWELL

Mrs Rachel Lomax,
H M Treasury

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BMC



Treasury Chambers, Parliament Street, SW1P 3AG
01-233 3000

Prime Minister
Your colleagues recommend:
(a) that we sue the Assembly ourselves (as well as through the Council) and seek an interim order to suspend illegal elements in the budget;

PRIME MINISTER

(b) defer a decision whether or not to take action against the Commission;

ILLEGAL COMMUNITY BUDGET FOR 1986 : UK ACTION

(c) pay our full contribution to the budget meanwhile, so as not to spoil the chances

The President of the European Parliament, M. Pflimlin, signed on 18 December the Community budget for 1986 as voted by the Parliament in its December plenary. The Parliament has thus adopted illegally, in defiance of the Treaty, a budget which includes a larger total for non-obligatory expenditure than the Council had agreed. The Council responded on 20 December by deciding (by 7 votes to 3) to take the Parliament to the European Court.

of our case, but on a without prejudice basis. Point (c) is the most difficult & may well attract adverse comment

UK objectives

The fundamental issue in this dispute is not the precise level of spending in the 1986 budget but rather the balance of budgetary power between the Council and the Parliament. If the Court cannot be persuaded to find the Parliament's action illegal, the Parliament will undoubtedly make a habit of adopting budgets which go far beyond what is acceptable to the Council, which will become little more than a cypher. We must therefore do everything we can to ensure that the Parliament's action is found illegal. We must also aim to protect our Fontainebleau abatement and to end up with the lowest possible figure for the 1986 budget total.

in Parliament. But the reasons & motives are good: and we can always change our mind later.

Matters for decision

With these objectives in mind, there are four matters which we need to consider:

Yes or No Agree?

- First, should the UK bring a separate case against the Parliament, alongside the Council's case?

CDP 15/1



- Second, should we simultaneously seek an interim order suspending application of the illegal elements in the budget?
- Third, should we also bring a case against the Commission for implementing an illegal budget?
- Fourth, how much should we contribute to the budget in the meantime, while these matters are sub judice?

We need if possible to resolve these matters in the course of this week in order that Counsel may prepare and deposit the necessary pleadings with the Court by the deadline of 28/29 January.

The Law Officers and Counsel have been consulted about the legal implications. The Law Officers' advice is reproduced at Annexes A and B.

Attitudes of other member states

It appears from discussions at official level that the position in France, Germany and the Netherlands is as follows:

- Case against the European Parliament. The Dutch (who now have the Presidency) have already decided to bring a case (though not to seek an interim measures order), provided France or Germany do so as well. Germany and (less certainly) France are likewise expected to bring cases, including applications for interim measures. The Germans are expected to decide on Wednesday and the French by the end of the week.
- Case against the Commission. The Germans and Dutch do not intend to bring a case against the Commission, certainly at this stage; French officials see some merit in doing so if the French Government decides to take court action, but we cannot count on this.



- Rate of contribution. The Germans and Dutch will pay in full: they believe that they are under a legal obligation to do so until the Court has pronounced otherwise. The French have still to decide but will probably pay in full as well.

Case for suing the Parliament

Individual member states would not normally sue the Parliament alongside the Council, and the Head of the Council's legal services has warned that the Court might be irritated by this. There are, however, cogent reasons for the UK (and other member states) bringing separate cases, and the Law Officers have advised that we have a reasonable prospect of winning. The main considerations are:

- i. Possible loss of majority for Council's case. If, as is all too probable, one of the seven member states which supported the December decision should later decide to withdraw its support, the necessary majority in the Council would be lost and the Council's case could collapse.
- ii. Possible mishandling of Council's case. The Council's legal services cannot be relied on to put the full range of legal arguments which our own legal advisers would wish.
- iii. Possible inadmissibility of Council's case. The legal advice is that it is not impossible that the Court might rule that the Parliament cannot be sued under Article 173 of the EEC Treaty. In that event, the case would need to invoke Article 38 of the ECSC Treaty, which makes provision for member states (but not the Council) to sue the Parliament.



The detailed basis of our pleadings has still to be determined. But the Law Officers have suggested that our main argument should be that the budget is valid pro tanto (ie up to the amounts agreed by the Council in its second reading budget) without excluding the alternative interpretation that no valid budget has been established and that the Community ought accordingly to be on a 'provisional twelfths' regime. In parallel with our substantive action against the Parliament, we would also ask the Court for an interim order suspending implementation of the disputed elements in the budget pending judgment by the Court.

Case for suing the Commission

The Commission have indicated that they intend to implement the budget as adopted by the Parliament in full. The question arises, therefore, whether we should sue the Commission as well as the Parliament.

We may need to sue the Commission at some stage if the Court unexpectedly judges the case against the Parliament to be inadmissible. As the Germans and Dutch have concluded, however, there is no need to decide on this further step now, and I suggest we suspend judgment for the time being. A particular difficulty will be to identify an 'act' of the Commission which we could challenge successfully.

How much to pay in the meantime

My natural preference would be not to pay in full towards the budget as established by the Parliament but to contribute only the sums needed to finance the elements which are not in dispute. We would not then have to ask Parliament, as in 1982, for a Supplementary Estimate to finance our contribution towards those parts of the budget which we consider illegal.



But Counsel has advised that such a course could prejudice in some degree our primary objective of winning the substantive case against the Parliament. It would prejudice still more our chances of winning an interim or suspensory measures order. Counsel has also advised that, if we declined to pay in full, the Commission would be likely to ask for interim measures requiring us to pay in full until the Court has resolved the substantive issue. If the Court granted this (as is quite possible), we should be obliged to reverse engines within three or four weeks and pay in full. If on the other hand the Court rejected the Commission's request, it could still judge later, at the end of the judicial process, that member states are obliged to pay in full, and we should be liable to pay interest penalties running into millions of pounds sterling.

I conclude, regretfully, that, tiresome as it will be to have to ask Parliament for a Supplementary Estimate, we ought to decide provisionally to join with other member states in meeting the Commission's requests for payment in full while (a) making clear that our contribution to the disputed elements of the budget is without prejudice and (b) seeking from the Court an interim order suspending implementation of these elements as suggested earlier. But if by any chance the French decide not to pay in full, we should be prepared to join with them and we should confirm with them in the meantime that this is our position.

Conclusions

To summarise, I propose that, subject to the views of yourself and the Foreign and Commonwealth Secretary and any further views of the Law Officers and Counsel, we should now decide -

- (a) to join other member states in bringing our own case against the European Parliament, including a request for interim or suspensory measures;
- (b) to suspend judgment for now on whether to bring a case against the Commission; and



(c) to contribute in full to the budget for the time being on a without prejudice basis, unless and until the Court directs otherwise, but to reconsider this if the French should decide not to pay in full.

As mentioned earlier we ought if possible to resolve these matters by the end of this week.

I am copying this minute to the Foreign and Commonwealth Secretary, the Law Officers and Sir Robert Armstrong.

YR.

(N.L.)

15 January 1986

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ANNEX A

01-405 7641 Ext.

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.

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

6 January 1986

Jean Juhet

1986 EC BUDGET

The Lord Advocate and the Solicitor General for England and Wales ("the Law Officers") have considered your letter to me of 23 December and its enclosures. Their views on the questions asked in paragraph 29 of your letter are as follows:

- (1) On the evidence presently available, there is a reasonable prospect of the European Court holding that the Parliament acted unlawfully (a) in exceeding the maximum rate and (b) in adding obligatory expenditure.
- (2) The Council having decided to challenge the legality of the Budget in the European Court, the Law Officers consider that it would be desirable and prudent from a legal point of view for the UK also to take the matter to the Court. (The Law Officers recognise, of course, that there may be policy reasons for not proceeding, alone among the Member States, to challenge the Budget). A challenge by the UK would give us control over the way in which the case is pleaded before the European Court and would ensure that the case presented before the Court is consistent with any action taken in the UK limiting our contribution to the Budget. It is also relevant that Article 38 ECSC provides for applications being made to the Court by a Member State (but not by the Council). Any UK challenge should be made by way of a separate application rather than by way of intervention in the Council's Application. It would be unsafe for the UK to limit its contribution and then simply await a challenge in the European Court by the Commission for the reasons given by the Attorney General in paragraph 3(f) of his letter of 22 January 1982 to Mr Ridley. Moreover, it would be tactically preferable for the UK to be a Plaintiff rather than a Defendant in any proceedings.

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(3) The UK should attack the act of the Parliament in adopting the Budget (or the Budget itself) and also, in case the Court declines to exercise jurisdiction over the Parliament, the Commission's request for payment of February's VAT contribution (although the Law Officers acknowledge the difficulty of establishing that this request is an "act"). It will also be necessary to consider attacking any other acts by the Commission which are manifestations of its implementation of the Budget as adopted, such as for example implementation of the Parliament's unlawful amendments to obligatory expenditure or expenditure exceeding the monthly one-twelfth ceiling. Decisions on whether to attack such acts will depend on the terms and timing of those acts, as well as on the extent to which arguments as to the legality of the acts would be consistent with the UK's various arguments on the legality of the Budget (see (4) below).

(4) From the legal point of view it would be desirable for the reasons given by the Attorney General in his letter of 22 January 1982 to Mr Ridley that any proceedings launched by the UK should contend that the Budget be annulled as to its disputed part (pro tanto validity). The UK should plead in the alternative that the Budget be declared void in toto. It will, however, be important to ascertain the views of other Member States before making any final decisions on the content of the UK's Application.

(5) The Law Officers consider that the UK cannot, in the absence of a valid Budget, abate its VAT contribution automatically, either on the basis of Article 3(3) of the new Own Resources Decision or on the basis of a carry-forward of the rate applicable under Article 3(4). They repeat the advice given by the Attorney General about the Granaria Judgment in his letter of 22 January 1982 to Mr Ridley but recognise that the European Court may well at the end of the day extend the Granaria doctrine to the Budget, especially if it finds it has jurisdiction over the Parliament. The Law Officers consider, on the basis of the material currently before them, that the legal obligation on the UK is to make monthly contributions towards the Budget to the extent of its share of a 1.25 becu Budget, modulated in accordance with the provisions of the new Own Resources Decision. Monthly



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contributions to this extent would be justified on the ground either that the Budget was valid to the extent of 1.25 becu and the Own Resources Decision operated to modulate the UK's contribution or that the Budget was invalid and monthly contributions should be made on the basis of the second reading draft Budget. Should other Member States consider themselves bound to limit their contributions on a different basis, the Law Officers would wish to consider the arguments of those States justifying their limited contributions.

(6) Whether the Commission would succeed in an application for interim measures is doubtful. The Law Officers consider the arguments in paragraph 19 of your letter against such measures being granted as persuasive. They would not, however, rule out the possibility of such measures being ordered if the Commission is able to argue that it is suffering serious difficulties in implementing the Budget.

I am copying this letter to Douglas Duncan, Andrew Edwards, Martin Eaton and Tim Pratt.

Yours ever,

P. Hoel.

M L SAUNDERS

20/1/82
Warden

ANNEX B

MR AJC EDWARDS
IPS CEF
EST MST L
SIR O WASS
SIR K COLZENS
MR MITCHELL
MR KEMP
MRS MEDLEY-MILLER
MR ALLWOOD
MR ASHFORD
MR DONOVAN
MR BOTT UKREP



22 January, 1982

Let Nick

EUROPEAN COMMUNITY BUDGET FOR 1982

1. Thank you for sending me a copy of your letter of 20 January to the Lord Privy Seal. In view of the timetable for a decision by colleagues that is outlined in the last substantive paragraph of your letter and despite the quite unreasonably and unnecessarily short time that was left to me to consider the difficult and important legal issues on which my advice was sought - your letter was not received here until yesterday morning and even then arrived without its essential enclosure - I thought it right to put aside other work and deal with this at once. I am therefore now able to give you the advice which you have requested. But I must voice the hope that I shall not again be put in the intolerable position of being expected to express, within what in practice is a matter of hours, a considered opinion on issues as complicated and difficult, and at the same time of such political and practical importance, as those with which we are now concerned.

2. Having considered the summary, enclosed with your letter, of the views of the departmental lawyers, I see no reason to dissent from their analysis or from their assessment both of the strength of our case on each of the issues involved and of the likely reaction of the Court. However, for convenience of future reference, I indicate below, in a little more detail, the conclusions which I have reached on each of the legal elements of the problem. In the

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light of these conclusions and having regard to your own analysis of the political and practical considerations, I concur in the course of action which you propose.

3. My views - necessarily expressed in summary terms - on the legal aspects of this matter are as follows:

- (a) I think that we have a good case for arguing that Food Aid given in pursuance of international conventions (in effect, cereals and sugar) should be classified as "obligatory expenditure" but that the remainder of Food Aid will probably have to be accepted as "non-obligatory expenditure". I would expect this to be the view which would be adopted by the Court.
- (b) I think that we have a strong case for resisting the contention - if it is indeed the European Parliament's contention - that all entries in Chapter 100 of the Budget are to be treated as "non-obligatory expenditure": all the arguments of logic and practicality seem to support our view that what determines the "obligatory" or "non-obligatory" nature of an item is the intended use of the expenditure to which it refers and not the status of the item as a provisional or definite entry in the Budget. Again, I think that the Court is likely to uphold us on this issue.
- (c) I also think that we have a strong case for resisting the argument - and again one has to add "if it is indeed the argument which the European Parliament relies on" - that the payment appropriations agreed by the Council on 25 November established an agreed new maximum rate as contemplated by the fifth paragraph of Article 203.9 of the Treaty and that this then entitled the Parliament to insist on further increases of "non-obligatory expenditure" up to 50% of that new maximum rate. Here, too, I think that the Court should be with us.
- (d) It follows from the above that I think that the Parliament was not entitled to adopt a Budget containing the increases in dispute. However, I do not think it likely that the Court would uphold a contention that the whole Budget, as the Parliament purported to adopt it, was invalid. I think it more likely that they would confine the area of invalidity to the excess of the Budget, as so adopted,

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over the proposals which left the Council on 25 November and I think that this is the view of the law on which we should take our stand.

- (e) I turn now to what we should do when faced with a request by the Commission for a contribution calculated on the basis of the Budget as adopted by the Parliament. I do not think that the Court's decision in the Granaria case should be construed as requiring us to accept the validity of what Parliament did in the present case until such time as it is invalidated by a judicial decision. I think that we must therefore proceed on the basis that we do not have a "Community obligation", within the meaning of s.2(3) of the European Communities Act 1972, beyond that part of the Budget which reflects the 25 November proposals and, in these circumstances, there is no legal basis for the payment of the excess out of the Consolidated Fund. As I understand it, the competent authorities would not, in the light of this advice, authorise the release of the excess funds and the option, discussed in your letter, of paying in full but under an express reserve is therefore not open to us. I add that, even if it were, I think that it would be of questionable propriety in view of the doubts that we entertain and it would certainly expose us to gravely embarrassing challenge in our own Parliament. Faced with the choice between that sort of challenge and the risk of challenge through judicial proceedings in Luxembourg, I am strongly of the opinion that it is the latter that is to be preferred.
- (f) Our refusal to pay in full the contribution demanded by the Commission will of course expose us to the risk of infraction proceedings. We could defend ourselves in those proceedings only by asserting the invalidity of the demand and we can only do this if we have, within the time prescribed by Article 173 of the Treaty, ourselves instituted proceedings against the Commission. I therefore advise that such proceedings must be instituted within the prescribed time (two months and ten days from the notification to us of the demand). I emphasise that the decision to institute such proceedings is a necessary corollary of the decision to refuse payment in full: it is not a decision which will remain open to be taken at a later date. This does not mean, of course, that the initiation of the proceedings, or their continuation if already initiated, may not be made unnecessary by a subsequent political settlement.



4. I ought to add that the assessments which I have made above about the likely reactions of the European Court must be read subject to the usual caveat that this Court is a very unpredictable tribunal and takes what we would regard as an excessively political approach to some of the problems which come before it, particularly in cases where one organ of the Community is challenging the competence of another. Moreover, where what is at issue is an assertion by the European Parliament, as against the Council, of its claimed responsibilities in connection with the Community Budget, I think that we must expect the Court to be instinctively on Parliament's side. But subject to this word of caution, I stand by the predictions I have made above.

I am copying this letter to the Lord Privy Seal, Chancellor of the Exchequer, the other members of OD(E), the Minister for Overseas Development and Sir Robert Armstrong.

Yours GC.

Michael

Rt Hon Nicholas Ridley MP
Financial Secretary to the Treasury
HM Treasury
Parliament Street
London, SW1

