

CCP



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Prime Minister
There was no time to
consult you during the

Treasury Chambers, Parliament Street, SW1P 3AG

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

day. But I think
this step is
inevitable.
22 January 1986

CCP
22/1

Dear John,

MF

ILLEGAL COMMUNITY BUDGET FOR 1986: NEXT ACTION

As you will see from the Chancellor's minute of 15 January and Charles Powell's letter of 16 January below, the Prime Minister has endorsed the Chancellor's proposals for action on the illegal Community budget for 1986.

We have been giving careful thought, as the Prime Minister suggested, to the Parliamentary handling and the line to take on why we shall be paying in full to a disputed budget. We have now to assume that all other member states, including the French, will be paying in full.

As mentioned in the Chancellor's minute, we cannot pay direct from the Consolidated Fund contributions to elements in the Community budget which we regard as illegal. We need therefore to seek Vote provision. In principle the simplest course would be to announce our policy next week and then to make a drawing on the Contingencies Fund, followed by presentation of a Spring Supplementary Estimate. But a TCSC report in 1982 asked that on all future occasions the Government should submit Supplementary Estimates on which the House could decide before any payment is made to an illegal budget. We must, I am sure, comply with this request.

We propose, accordingly, to present a Special Supplementary Estimate to Parliament today (following a precedent established a year ago with regard to our contribution under the 1984 inter-governmental agreement) and to announce our general policy on the 1986 budget at the same time in a Written Answer to a Question already tabled by Mr Foulkes. We are anxious to secure Parliament's approval for the Supplementary on Thursday 30 January, thus enabling us to make on time and in full our first payment to the 1986 budget as adopted, on Monday 3 February.

The basic reason for haste is that we risk prejudicing our case



before the European Court, and not least our application for an interim measures Order suspending application of the disputed elements in the budget, if we delay payment in full. A further significant anxiety is that we shall incur a potential liability for penal interest charges for every day we delay beyond 3 February. These charges, though not large in themselves, would be a further source of criticism and controversy, possibly including further adverse comments from the TCSC as well as criticism by the C and AG. We would therefore hope to present the Estimate today and then to have the House debate and vote on it on Thursday of next week, 30 January, if this can possibly be arranged. That would enable us to pay on time on the following Monday 3 February.

It is in my view highly desirable to meet this timetable if we possibly can so as to minimise the amount of controversy surrounding this tiresome issue. I do appreciate your difficulties with the Parliamentary timetable: I would not want to exaggerate the costs of deferring the business till the week of February 3, and we could argue before the Court that our late payment was a function of the Parliamentary process, but it is much less clean than paying on the correct date, and it could be argued against us that the Parliamentary process was within our control.

As regards presentation of the decision to pay in full, we must I suggest emphasise that (a) the key thing is to win the Court case and not to prejudice it by appearing to prejudge the Court's decision and (b) we need to minimise any potential liability to penal interest charges.

I attach the draft Written Answer (cleared with the Law Officers), Press Notice and Q and A briefing. The latter will, I hope, be useful to other Press Offices as well as our own.

If you or other Ministers have any points on these proposals, we should be glad to have them by 3.00pm today at the latest, please.

I am copying this minute to the Prime Minister, Geoffrey Howe, John Wakeham, the Law Officers and Sir Robert Armstrong.

I was ever
Pm

PETER BROOKE

I do apologise for the timetable implied in the penultimate paragraph, but a number of strands had to combine in the final determination of the way forward (the French, not least), and these have only just coalesced.



ANNEX A

Sir P Middleton
Sir G Littler
Mr Lavelle
Mr Scholar
Mr Butt
Mr Crabbie
Mr Mortimer
Mr Donnelly
Miss Wheldon - T.Scl

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

PRIME MINISTER

ILLEGAL COMMUNITY BUDGET FOR 1986 : UK ACTION

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.

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.

Matters for decision

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

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

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- 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

RESTRICTED



10 DOWNING STREET

From the Private Secretary

Dear Rachel,

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.

Yours sincerely
(C D Powell)

C D POWELL

Mrs Rachel Lomax,
H M Treasury

RESTRICTED

ANNEX B

16 JAN 1986

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Mr A. EDWARDS

EST. MGT.

Sir P. MIDGTON

Sir C. LITTLE

16 January 1986

Mr LAVELLE

Mr SCHOLAR

Mr BUTT

Mr CRABBIE

Mr MORTIMER

Mr DONNELLY

Miss WHEDON, T. Sec

SECOND REPORT

The Treasury and Civil Service Committee have agreed to the following Report:

SPRING SUPPLEMENTARY ESTIMATES

INTRODUCTION

1. Two Spring Supplementary Estimates accounted for by the Treasury or a public body associated with the Treasury were among those presented to the House on 18 February 1982. We decided to obtain further information on both of them—in the first case by hearing oral evidence. It is our view that both of the Estimates raise issues with which the House should be acquainted before the appropriate Consolidated Fund Bill is debated on Second Reading (under the existing timetable for Supply it was not possible to make a report before the Estimates themselves were voted upon).

CLASS II, VOTE 12 (BUDGET OF THE EUROPEAN COMMUNITIES)

2. This is a new Vote resulting from the adoption by the European Assembly of a larger budget than that agreed by the Council of Ministers. The amount required in the financial year 1981–82 is £7,100,000, although another £20 million or so will fall to be paid in 1982–83 if the dispute which gave rise to the need for provision of this kind is not resolved before the end of the year.¹

3. The House was forewarned of the need for this Supplementary Estimate in a statement made by the Lord Privy Seal on 3 February.² This also made it clear that recourse was being made to the Contingencies Fund, so that sums could be advanced before the Vote came before the House. A further description of the circumstances which had arisen within the Community institutions over the adoption of the Budget for 1982 was given to the Committee by witnesses from the Treasury and the Foreign and Commonwealth Office.

4. Briefly, the sequence of events in the Community has been as follows. On 21 December 1981 the European Assembly adopted the Budget for 1982 in a form which the United Kingdom Government found questionable on two counts. First, the total sum finally included was in excess of the "maximum rate of increase" allowed under Article 203(9) of the Treaty of Rome. Second, the Assembly claimed that the food aid item within the disputed amount was non-obligatory expenditure; this meant that they were allowed to increase the amount proposed by the Council. HM Government, on the other hand, regarded the food aid item as obligatory expenditure, which the Assembly had no power to increase to a sum greater than that decided earlier by the Council.³ These objections were discussed in the Budget Council where it became clear that not all member governments took the same view of the legal position.

5. It would have been open to HM Government to institute proceedings against the Assembly in the European Court of Justice. But the view was taken that it would be preferable, if agreement could be reached, there, that the Council of Ministers itself should take the matter to the Court. Accordingly, a compromise was reached whereby the Council agreed that proceedings should be instituted

¹Q.7–8.

²HC Deb (1981–82) 17, c 305–9.

³Q.86–88.

before the Court, but that in the meantime member States would pay in full the sums resulting from the Budget as adopted.¹ Although discussions have continued between the Council, the Commission and the Assembly to try to resolve the problem without the need for a judgment by the Court, proceedings in the Court have now been started as decided by the Council.²

6. Faced with the need to make the appropriate contribution to cover the Budget as adopted, the Government decided that as the part added by the Assembly was in their opinion not legally adopted, it could not be treated, as was the rest of the Budget, as a direct charge on the Consolidated Fund in compliance with section 2(3) of the European Communities Act 1972. Accordingly, it was decided to follow the alternative course of seeking the authority of Parliament for the first payments to be made; this was done by presenting a Spring Supplementary Estimate, with advance drawings being made from the Contingencies Fund.³

7. The situation which has now been reached is unprecedented. We consider it to be an unsatisfactory precedent. However, we accept the Government's view that, once the compromise had been arrived at within the Council, the money required could not be a direct charge on the Consolidated Fund. In our opinion, the right course for the Government then to have taken would have been to present an immediate supplementary estimate on which the House could have taken a decision. This would have been preferable to making use of the Contingencies Fund.⁴

8. Both the Lord Privy Seal in the House and the representative of the Foreign and Commonwealth Office before the Committee were reticent in explaining why it was that the Government preferred that the case should be brought to the Court by the Council as a whole rather than by themselves, when the price to be paid for such a decision was that the United Kingdom had to agree to make payments to cover the whole of the Budget as adopted by the Assembly rather than that part which they believed to be legally adopted.⁵ We realise that this is delicate ground. We accept that there is some political weight in the contention that it is preferable that the case before the Court should be seen to be one involving two community institutions, rather than one or more member governments and one institution.⁶ Nevertheless we cannot escape the conclusion that, as well as recognising the political advantage of carrying their partners with them, the Government's view was that proceedings launched by a unanimous Council were more likely to produce a sympathetic reaction from the Court than proceedings brought by one or two individual member states. We have already stated our view that the Government would have been better advised to put the question of the payment of public money to the judgment of the House before disbursement, thereby allowing a full discussion of the circumstances.

9. It is, to say the least, an unusual posture for parties when going to law to pay out beforehand sums which they regard as illegally levied and which they would be under no obligation to pay if they won their case. However, that is precisely the position in which the Government have placed themselves. The Lord Privy Seal asserted that the money would be repaid if the case went against the

¹HC Deb (1981-82) 17, c 305.

²Q.1-2.

³Q.10, 20-24.

⁴Evidence on legal issues surrounding the use of the Fund (about which there is some disagreement) will be appended to our forthcoming Report on Budgetary Reform in the United Kingdom.

⁵HC Deb (1981-82) 17, c 306; Q.31-33.

⁶Q.32-33.

Assembly.¹ We were glad to note that the Treasury confirmed this by stating that the means by which this would be done in due course would be to deduct an appropriate amount—which we trust will include interest—from the monthly VAT contribution.²

10. We note that this is the fourth successive year when there have been major difficulties between the Council and the Assembly over the adoption of the Budget, although on each occasion the precise nature of the dispute has been different.³ In so far as the difficulties have arisen because of uncertainties about the interpretation of community law—and that is especially so this year—we welcome the fact that the Council have agreed that a case should go before the European Court of Justice.

11. We regret that it has not been possible for the Government to provide a copy of the case as presented in writing to the Court by the Council.⁴ Nor have we seen the legal advice given to the Government. It is our opinion that the reference should be sufficiently wide to allow all the relevant issues to be resolved one way or the other in the near future and we recommend that the Government keep the House fully informed on this score.

12. Having considered the circumstances so far as we know them and noting the unusual features of the present situation, we do not recommend on this occasion that the House should take steps to disallow the Vote. But it is our opinion that, if the overall position is not satisfactorily resolved in 1982 and a similar legal problem arises on a subsequent Community budget, the Government should refuse payment of any disputed sums unless the matter has been debated and decided in Parliament.

CLASS XIII, VOTE 10 (ECONOMIC AND FINANCIAL ADMINISTRATION: DEPARTMENT FOR NATIONAL SAVINGS)

13. A further sum of £1,221,000 is needed to supplement the £79,179,000 already voted for the Department for National Savings. We sought from the Department and the Treasury a further explanation than that provided in the Note by the Financial Secretary, which simply said that additional provision was being sought "because the amount received from the National Savings Bank Fund for the cost of administration of the National Savings Bank Ordinary Account was lower than expected".

14. The two reasons for this shortfall in the amount recovered from the National Savings Bank Fund were (i) that the proportion of the transactions of the National Savings Bank which are ordinary account transactions had decreased in the course of the financial year faster than forecast and (ii) that an adjustment of about £0.5 million had to be made for over-recoveries in previous years.⁵

15. The National Savings Bank administers two types of account, the "Ordinary" and the "Investment". The Investment Account was defunded on 31 December 1980 and the related expenditure transferred to the Vote. A further change is to take effect at the beginning of the financial year 1982-83, when the Ordinary Account Fund, instead of making an Appropriation in aid of the Department for National Savings' own Vote, will make a counterpart payment

¹HC Deb (1981-82) 17, c 305.

²Q.66. See also Appendix 1, p 13.

³Q.81.

⁴Appendix 2, p 14.

⁵Appendix 3, p 15.

MR FOULKESTo ask Mr Chancellor of the Exchequer, if he plans to take any steps to counter the European Commission's implementation of the Community budget in the form approved by the European Parliament; if he intends to pay the United Kingdom's share for February on the basis of the budget approved by the European Parliament; and if he will make a statement.

Mr

(Pursuant to his reply, 21 January 1985, Cols -)

The European Parliament adopted on 18 December a Community budget for 1986 which includes a larger total for non-obligatory expenditure than the Council had agreed and other disputed elements.

In the view of seven member states, including the United Kingdom, the Parliament's action was not compatible with the EEC Treaty, and the Council decided accordingly on 20 December, by 7 votes to 3, to bring an action against the European Parliament before the European Court. The French, German, Dutch and Luxembourg Governments have decided to bring separate actions against the Parliament.

The UK Government has likewise decided to bring a separate action against the European Parliament in which the Court will be asked to ^{rule} declare ~~invalid~~ ^{that} either the disputed elements in the budget, ^{are invalid} and in particular the 629 mecu (some £385 million) of non-obligatory expenditure which the Parliament added in mid-December to the Council's second reading draft budget of 27 November, ^{in the alternative, that no legal budget has been established.} ~~or the budget as a whole. Counsel for the~~

The UK will shortly deposit ^{an application} ~~pleadings~~ with the European Court in Luxembourg.

The Government will also be applying shortly to the European Court for an interim measures order suspending implementation of the disputed elements in the budget pending substantive judgment by the Court.

Since the elements which the Parliament added to the budget after the Council's second reading budget were not, in the Government's view, legally adopted, we cannot treat our contributions towards those elements, which amount to some £6 million a month, as we do the rest of the budget, as a direct charge on the Consolidated Fund under Section 2(3) of the European Communities Act, 1972. The Government proposes, as in the 1982 budget dispute, to contribute in full to the budget but to make clear that our contributions to the disputed elements in the budget are paid on a without prejudice basis, pending judgment by the European Court. The authority of Parliament for this element in our contributions is being sought in a Special Supplementary Estimate for the current financial year which is today being presented to the House.

The Government's intention in adopting this approach is to minimise the risks of prejudicing the United Kingdom's case before the European Court, including our application for an interim measures order, and likewise the risks of incurring liability for penal interest rate charges.

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Budget.

