



DEPARTMENT OF TRADE (RM) 11

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20 April 1976

J E Herbecq Esq
Civil Service Department
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Dear Herbecq,

SPECIAL COMMISSIONS

I attach, for your meeting at 3 pm tomorrow (21 April) a paper we have prepared following discussions with the Treasury and Bank of England on Special Commissions and similar payments.

I doubt whether this paper is complete in its factual information - and in view of the hurry I would not present the conclusions as much more than a starting point. As you will see, we have tried to make some positive proposals on what the Government might say and I understand that Sir Douglas Allen is holding a meeting next Monday to reach final conclusions and make proposals to Ministers.

As you will see, I have marked this paper "Personal and Confidential" and copies of it are being sent to Sir D Allen (CSD), Sir Norman Price (Inland Revenue), Permanent Secretary's Office (Ministry of Defence), Cairncross (Home Office - representative not yet decided), Statham (Foreign Office), Bennett (Bank of England), Jordan Moss and Hodges (Treasury) and Hooton (Treasury Solicitor's Office).

yours sincerely

Robin Gray

R W GRAY

SPECIAL COMMISSIONS AND ALLIED PAYMENTS
Memorandum by the Department of Trade

From "Pygmalion": -

Prof. Higgins - Do you mean to say that you would sell your daughter for £50?

Mr Doolittle - Not in a general way I wouldn't; but to oblige a gentleman like you I'd do a great deal, I do assure you.

Col. Pickering - Have you no morals, man?

Mr Doolittle - Can't afford them Governor.

Annexed to this memorandum is a note by the Treasury and Bank of England on Special Commissions. From this it will be seen that Banks have delegated authority to authorise payments of commissions up to £50,000. Beyond this, reference is made to the Bank of England who allow amounts up to 10% of the value of the contract. Amounts in excess of 10% - more and more the minimum while larger percentages are becoming more frequent - are referred to the Treasury. The following important points also emerge from the Annex: -

- a) Most of the Special Commissions are paid into accounts in third countries - the implications of corruption are thus clear. We are alone among advanced industrial countries, through the Exchange Control, in knowing about these payments and authorising them.
- b) The Exchange Control legislation is concerned with safeguarding the UK balance of payments - and has not been used to endeavour to ensure that foreigners obey laws in their own country.
- c) Any attempt to use Exchange Control, at any rate as an isolated operation by the UK, would be counter-productive - and would undermine the confidence between the Exchange Control authorities and business on which the successful operation of exchange control generally depends.

2 The Department of Trade agrees with these conclusions. The Department has some knowledge of particular transactions involving questionable payments by British firms - in some cases firms have told us what they have done (particularly where, following changes of regime in developing countries, the propriety of particular contracts has been questioned). The Department is also aware - for example through ECGD operations - that large commissions, additional to normal commissions, are sometimes paid. The number of cases of which we have hard knowledge is relatively small; but in general contact with industry it has been commonly implied that in some parts of the world Special Commissions are a necessary part of successful business operation. The person receiving the commission is usually in a position to sway the purchasing decision and to facilitate consequential import arrangements.

3 As against all this some of our companies claim to have been successful in following a policy of not making payments through Special Commissions. Some contend that the problem is not one of avoiding the practice but of breaking it once started. However the increasing international publicity is probably causing concern, not only in the oil companies. For example, we have recently been told by one large British company that it will withdraw completely from an African country in the absence of a clear statement of policy by the British Government - on the grounds that political controversy at home about Special Commissions could seriously damage the company's long term commercial interests. We have informally asked the Director General of the CBI to consult a few large companies to see how far they are concerned about Special Commission payments and what action they think the Government should take.

4 There is little direct evidence but we have no doubt that companies in other advanced countries are subject to the same pressures. President Ford, when, at the beginning of April, he appointed a Task Force on "Questionable Corporate Payments Abroad" is reported to have said that "while the full dimensions of the situation are not known, recent disclosures and allegations indicate that a substantial number of US corporations have been involved

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in questionable payments to foreign officials, political organisations or business agents". The US experience would thus appear to be the same as our own - with the difference that, in the absence of an Exchange Control, the US Government has not itself directly authorised the payments.

5 The interest of Governments, and of international organisations, in bribery and corruption has been increasing rapidly during this year - the original Lockheed disclosures and the oil company payments to Italian political parties have fueled the fire. As already mentioned, President Ford has appointed his Task Force under the chairmanship of the Secretary of Commerce, Mr Elliott Richardson. This Task Force is due to produce a final report by the end of the year - US publicity has been careful to bring out that the enquiry will be general - a "policy" enquiry - and will not deal with particular cases. The Italian enquiry into the oil company payments is under way. There have been reports that French, German and Netherlands Governments are also making enquiries - although we have no first hand information about these.

6 Apart from national enquiries we are aware of the following international action:-

- a) In pursuance of UN Resolution 3514 (XXX) the Secretary General has asked Governments to provide by the end of April (in practice we think the end of May will do) information on national law and experience on "corrupt practices of trans-national and other corporations, their intermediaries and others concerned". The information collected by the Secretary General will be considered at the UN Session in the Autumn.

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- b) In March the International Chamber of Commerce announced the formation of a Commission, under the chairmanship of Lord Shawcross, with other eminent persons, to study "unethical practices". The Commission, which is due to report by the end of this year, is asked "without publishing findings on any particular case, to report generally, to suggest relevant guidelines for promoting correct conduct in such matters, and to indicate the respective responsibilities therein of executive and non-executive directors, of officers and auditors of corporations and of others concerned, including the relevant tax and law enforcement agencies".
- c) OECD's Commission on International Investment and Multi National Enterprises (CIIME) is working on three instruments concerning international investment which will be put to Ministers at the OECD Ministerial meeting in June. One will comprise voluntary guidelines for the conduct of multinational enterprises. The draft guidelines include the following provisions:-
- i) Enterprises should not render - and they should not be solicited or expected to render any bribe or improper benefit direct or indirect to any public servant or holder of public offices.
 - ii) Unless legally permissible, they should not make contributions to candidates for public office or to political parties or other political organisations.
 - iii) They should abstain from any improper involvement in local political activities.

There remain some substantial points of difference on other aspects of the three instruments but, if, as we hope, these can be overcome OECD Ministers may in June adopt some provisions on the lines indicated above. It is to be noted that these provisions are exhortatory and involve no direct Government commitments.

- d) The United States have proposed that ECOSOC should in June agree to establish a Working Party to study the setting up of an "International Agreement on Bribery and Corrupt Practices". It is generally believed that the US intention is partly aimed at smoking out the developing countries and also to relieve domestic pressure on the Administration to introduce unilateral legislation.

7 Two particular points may be noted from the foregoing summary of international action. First, some of the principal reports - the ICC and the US Task Force - are unlikely to be available before the end of the year and it also seems unlikely that there will be much progress in the UN or in ECOSOC before this time. Secondly, the forms of control and regulation mentioned go far beyond Exchange Control. The US Task Force is to cover such matters as anti-trust, corporate disclosure, and tax reporting. And the ICC study is also concerned with tax and law enforcement agencies. In the UK the Inland Revenue would not commonly be aware of any circumstances throwing doubt on the morality (or legality) of payments of commissions in the course of a trade. Moreover, in the case of commissions paid to non-residents by larger organisations, the likelihood is that the payments will be made by non-resident subsidiary companies, with which the Revenue will not be concerned. But even in the case of payments by UK resident companies, the Revenue function is solely to consider whether the payments were "wholly and

exclusively for the purposes of the trade" and to allow them as deductions if they were, without regard to the morality of the transactions. The Inland Revenue would not, of course, be free to disclose to other Government agencies any information they had obtained about commissions for the purposes of taxation.

CONCLUSIONS

8 It is clear that the British Government, either in Parliament or in international fora, or both, may soon need to make a major policy statement. One of our principal difficulties is that the Government, through the Exchange Control, has positive knowledge, and is clearly involved in a way in which Governments in other advanced industrial countries are not. But we believe that the fundamental reality is that the UK cannot take any unilateral action in the whole area of Special Commissions and similar payments for three principal reasons:-

- a) We cannot afford to lose overseas business - and much business is at stake - by adopting holier policies (as opposed to attitudes) than those of other industrial nations. Nor should we much alter business practice and ethics overseas if we did.
- b) We cannot in practice use Exchange Control to identify with certainty payments that are corrupt or illegal in the host country. There is no clear dividing line between commissions and bribes. If we attempted to draw any such distinction there is a real risk that our companies would evade the Control (as opposed to their present general willingness to cooperate with it) - the Control would be weakened and we should also encourage our own companies to be false or misleading in their dealings with the authorities.

- c) More generally, it is a well established practice that we do not use information collected through controls, or for statistical purposes, for other than the purposes stated and intended - and in important instances we are statutorily debarred from doing so.

9 Quite apart from the foregoing there must be many companies in the United Kingdom and individuals and organisations abroad who know that the Government already has information - and so long as present policies continue, will continue to accumulate information - that could damage their reputations. It is desirable, if it is acceptable in relation to Parliament, that the Government should make it plain that no information relating to individual companies or persons will ever be disclosed unless and until international action is agreed. Our disclosure of information about individuals would begin ^{- if ever -} only from a stated date.

10 Against this background it is suggested that any major statement of policy by the Government should include these elements: -

- a) HMG is opposed to bribery both on principle and for economic reasons. It puts up the price to the end user; it distorts competition. It tends to escalate.
- b) UK standards of business practice - and UK official standards - are not universal. What would be unethical or illegal in business in Britain, or by British officials, is in some countries the way business or administration is done. Companies have to make their judgments on a full assessment of local practice and custom.
- c) HMG deplores payments which may be construed as political interference in overseas countries by the companies concerned. Here again, in many countries, political contributions are not illegal and may even be expected.

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- d) Major international enquiries - such as the ICC enquiry and the US Task Force - are clearly not concerned with individual transactions but with establishing information about general policies and practices. This is also HMG's approach. HMG will not in present circumstances use the Exchange Control for purposes other than those for which it was established, the protection of the balance of payments. Other major countries do not operate exchange controls.
- e) It is general UK practice not to disclose information which relates to individual companies or persons where this information has been collected through particular controls or to provide aggregate statistical data. In some cases we are debarred by law from making such disclosures.
- f) Action to deal with bribery and corruption and political contributions is most effectively taken in host countries - where they wish to do so. HMG will cooperate fully in international action - such as is at present under way in OECD and the UN - in endeavours to secure greater control. While we shall not act unilaterally we shall play our part where other industrial nations are ready to move in collaboration with host countries.

ANNEX

"SPECIAL COMMISSIONS"Note by the Treasury and Bank of England

1 "Special Commissions" are aside from and in addition to commissions which are ordinarily paid to overseas agents for their normal services. Typically special commissions are not supported by documentary evidence and are usually paid to an account in a third country, eg a numbered account in Switzerland. The amount involved varies from a comparatively respectable percentage, say 10%, to much higher ratios; but with large contracts running into tens of millions of pounds, even a 5% special commission can involve a very considerable sum.

2 In the UK in contrast to many of our competitors, eg Germany, Japan and the USA, special commissions come to the notice of the authorities where they are associated with visible exports because an Exchange Control consent is required for their payment; and applications to the Bank of England come in from day to day. In that sense the UK is at a disadvantage. We suspect that special commissions often arise in the case of invisibles, eg overseas construction contracts, but payment for such contracts can be so arranged, the costs being largely offshore, that the special commissions are paid out of funds retained to cover these offshore costs, and so do not always come to the UK Exchange Control's attention.

3 UK banks have a delegated authority to authorise the payment of normal commissions up to £50,000. Beyond that or where there is inadequate supporting evidence, the application has to be referred to the Bank of England. Exchange Control is concerned with the protection of the UK balance of payments. In that context as regards special commissions, Exchange Control seek to ensure first that UK exports are properly paid for; and secondly, that the inflow generated by the export contract less the outflow resulting from over-invoicing to produce special commissions,

at all times leaves the UK with a net benefit. Exchange Control prefers to see special commission payments keeping in step with progress payments for the export. Enquiries are made to try to establish that UK residents are not the recipients of a special commission paid abroad.

4 The Exchange Control Act 1947, being legislation concerned with the safeguarding of the UK balance of payments, has not been used to endeavour to ensure that persons outside the jurisdiction behave according to the law in their own countries or that such persons observe any particular moral code or ethics. It would be fruitless to attempt to do so. Exchange Control prefer, however, to know the true facts and would not wish to encourage UK companies to "cover up" special commissions: the successful operation of control in the UK depends to a large measure on the business and financial community playing to the rules. This involves the establishment and the continuous fostering of frankness and understanding between the Bank and the business and financial community; and a sensible and equitable approach so that that community is not placed, given the Control's overall policy objectives, at a disadvantage vis-a-vis its overseas competitors.

5 The existence of and need for special commissions if business is not to go elsewhere has long been recognised. For some years, exchange control policy in this field has been for the Bank of England to allow, on the basis in paragraph 3 above, amounts up to 10% of the contract value, beyond which reference is made to HM Treasury. The level of 10% has over the years tended to become the minimum rather than the maximum; but only recently have the amounts begun to escalate beyond, say 25%, to levels of 100% or more. A possible reason for this lies in the new rich oil markets in the Middle East and elsewhere where bribery has for centuries been endemic but which until recently has not emerged as such a striking factor in the international export scene.

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6 The present situation creates serious problems for Exchange Control's being involved in anything but a simple cash flow assessment to protect the balance of payments. For example, to withhold consent on payments above an agreed percentage in itself would mean acknowledging the acceptability of other special commissions. If the percentage inhibits particular orders there will be an incentive to avoid it by one means or another so as to obtain the contract: the consciences of exporters will not be stretched too far because they will see that there is a balance of payments gain from their business. Inevitably it will seem that the sensible administration of exchange control is being undermined. On the other hand, to close our eyes and encourage any device to avoid the direct involvement of the UK Exchange Control in the authorisation of the payment of special commissions would tend to encourage the evasion of exchange control rules in other contexts and threaten the credibility which we have been at pains to establish over the years.