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The Rt Hon Peter Rees QC MP
Chief Secretary to the Treasurer
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*Mr Kemp Mr
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Mr
Mr*
Dear Peter

ECs ACQUIRED RIGHTS DIRECTIVE

Two general issues as to the applicability of the Directive have arisen in correspondence. The first is the application of the Directive to the proposals to transfer the function of the GLC and the Metropolitan County Councils; the second is the extent to which the contracting out of services in the NHS is affected. I also see now from the latest letter from Lord Gowrie that advice is requested about the Audit Commission.

GLC and MCCs

It is right that consideration should be given to the applicability of the Directive. There are no clear limitations on its scope. Its provisions do not include any qualification on the concept of transfers of undertakings generally. It follows, as the Lord Advocate and I concluded when we looked at the Directive in the context of civil service transfers, that it is difficult to establish from the terms of the Directive itself that some limitation was clearly intended. Yet we agree that the context of Local Government reorganisation is far from the context of the takeover of businesses (other than by the acquisition of shares) in which the Directive was conceived.

As we wrote in paragraph 15 of the Joint Opinion:-

"Difficult

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"Difficult questions arise on transfers other than to the private sector. First, where a transfer is simply a hiving-off from one body to another in circumstances in which the transaction really amounts to no more than a recasting of Crown activities as opposed to the transfer of an undertaking to a new employer, it could be said that the Directive will not apply: This would arguably be the case with the transfers embodied in the National Heritage Bill. Second, where the transfer is not simply a recasting of Crown activities (eg where the transfer is from the Crown to a public corporation or local authority) and the activity could not be regarded as economic, either before or after the transfer, the transaction would be covered by the Directive if one takes it as applying to all activity but not so if one limits it to activities of an economic character."

This passage seems apt by analogy in the present context of transfers from one local authority body to another.

This exercise therefore brings to the fore the need for HMG to decide whether it should maintain the line that the Directive only applies to activities of an economic character. As was stated in the Joint Opinion, we believe there is a significant risk that the European Court would not uphold such a distinction. We do not think we can take the legal proposition any further. It must be a matter for colleagues to decide how to act in the light of that risk. However, we can say that unless and until the European Court were to hold the Directive to be of general application, there are defensible grounds for maintaining the distinction.

We believe the best argument to be that the Directive can have no application in spheres which cannot be said to

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affect the establishment or functioning of the Common Market (the Article 100 point). The context of reorganisation of Local Government would be a good occasion on which this argument could be tested as it is so far from the area envisaged by Article 100 or by the framers of the Directive. We are fortified in maintaining the distinction by the Commission's apparent acceptance hitherto of the way in which our Transfer of Undertakings Regulations have been drafted.

If HMG regards the Directive as only applying to activities of an economic character we can rule out most of the transfers envisaged as being outside the scope of the Directive (cf. the position reached in relation to HMG's proposals to transfer Crown activities where the majority are transfers to the private sector). There may be a small area left where we may need to consider more closely how to proceed. We have in mind the municipal airports and the Royal Festival Hall. We shall not comment on how to apply the Directive to these bodies unless our advice is specifically requested.

It may be that the same point applies to the Audit Commission. If the Directive is to be treated as of being of general application the transfer of the undertaking constituted by the Audit Commission is caught; if the Directive is limited to activities of an economic character it is not. We have no details beyond those in Patrick Jenkin's letter of 14 July upon which we can comment.

Contracting out

The second question raised in the correspondence is whether the Directive will apply to contracting out of services, particularly in the Health Service. We have not been supplied with any new information to take this

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issue any further than in the Joint Opinion. As we understand it, contracting out will not generally involve the transfer of an undertaking. A specific service which has been performed in-house will no longer be performed in this way. Some staff may be redeployed within the NHS; others may be made redundant. The outside contractor will use his own undertaking. It must be a matter for DHSS lawyers to advise whether in any particular case a transfer of an undertaking is involved in the light of the Opinion.

I have spoken to the Lord Advocate and he has agreed to my writing in the above terms.

I am copying this letter to the Foreign Secretary, the Lord Chancellor, the Secretary of State for Employment, the Secretary of State for Scotland, the Lord Advocate, the Minister of State for Local Government, the Minister for Health, other members of 'H' and of MISC 95, and to Sir Robert Armstrong.

Yours lve. Michael

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