Econ Pol.

THE STOCK EXCHANGE

Note of a Meeting - Tuesday 19 July 1983

Present:

The Attorney General

Sir Gordon Borrie (the Director General of

Fair Trading)

Simon Brown (Treasury Junior Counsel)

Sir Michael Kerry (the Treasury Solicitor)

Tim Pratt (Legal Adviser OFT)

Laurence Oates (LOD)

The Attorney General was delighted that the DG had requested to see him. He was not concerned with policy but there were a number of legal issues it would be helpful to discuss arising out of the prospect of an out of court settlement. The Stock Exchange had a choice of entry into a completely new Agreement or amending the present one. He confirmed that he had expressed the view that an Order under section 11 of the Act would not affect the jurisdiction of the court (although the point was clearly arguable). However, his view was that the effect of the Order would mean that the court would be considering hypothetical questions. It should not be asked to consider a Case merely with a view to future policy. On the particular issue of single capacity Ministers had the right to decide policy in relation to the ECs Stock Exchange Directives and if they enshrined single capacity in an Order under section 2(2) of the European Communities Act how could the court's decision affect the validity of the practice? In the changed circumstances brought about by both Orders it would be legally permissible and proper for the DG not to oppose an application by the Stock Exchange to have the Case adjourned sine die.

The $\overline{\text{DG}}$ indicated he would not elaborate on his reservations of policy. He argued that his duty to take proceedings continued

and the section 11 Order could only be effective if combined with a determination of the existing registered Agreement. Without this he was under an obligation to invite the Court to consider the issue and make a declaration. With it he considered he still had a discretion. His understanding was that the same conclusion could be reached in relation to single capacity even if an Order were made under the European Communities Act. The views of the Court could be useful. Whilst he accepted the right of Ministers to form a view on single capacity in the context of the Directives that view should not be reached after insufficient enquiry and consideration. On the issues generally, the Stock Exchange had always hitherto argued that the Court was not the appropriate forum; he feared that the proposed settlement lent encouragement to that view.

In discussion Simon Brown advised that the DG's duty was to put the Case before the Court; he would not be in breach of duty in letting the Court adjourn it sine die. The Stock Exchange could argue that as it was possible for them to enter into a new Agreement which would be outside the scope of the Act it would be futile to spend time and money on the Case. There was a point of propriety as to whether the Court should be invited to embark upon an expensive foray if the Stock Exchange had prospectively been taken out of the control of the Act.

In further discussion of the detailed stages which would take place if a section 11 Order were made after the summer recess, consideration was given to what the DG's attitude should be to an application by the Stock Exchange for a temporary stay pending this event. The Attorney General suggested that the Court could require the parties to return within 7 days of the operative date for further directions. He thought it common sense that the Judge could not be invited in the interim to require the parties to spend a lot of money on the Case whilst the effect of the orders, and indeed whether the Case would ultimately proceed at all, remained unclear. The DG was

concerned at the effect of a temporary stay on the Case. It may be that he could instruct Counsel to say he was not opposing the temporary stay (he would wish to discuss this with Counsel) but he could not give any indication of what his attitude would be when the Case returned to the Court in November. The attitude of the Judge was in his view a relevant factor.

LAURENCE OATES 22 July 1983

