May I have a copy of these papers for the fed. so that I can lay my hand on them quickly

PRIME MINISTER

EUROPEAN COMMUNITY: EXTENSION OF COMMISSION POWERS AND COMPETENCE

If you have the time, I think you will find it interesting to glance at the attached paper by the Cabinet Office on areas where the Commission are pushing forward the frontiers of their competence.

The main points to emerge from it are:

- the Commission are trying to extend the Community's competence into new areas: culture, education, health and social security, frontier problems. They are also constantly trying to enhance their status and role in international organisations.

- the techniques they use are: to propose advisory committees, rather than those types of committee where member states can vote, to implement agreed proposals: to build up a library of declaratory language (e.g., from European Councils) to justify subsequent proposals: to use a budget procedure ("actions ponctuelles") which enables them to finance new projects without a legal base: using existing powers in a novel way: and - most seriously - consistently using Treaty articles which require a qualified majority rather than those which require unanimity as the legal basis for their proposals.

- the European Court plays its part. The Court's view of the purposes of the Treaty tends to be closer to the Commission than to the Member States. It also tends to favour dynamic and expansive interpretations of the Treaty over restrictive ones. It usually supports the Commission over the choice of the legal base for its proposals.

- we need to remain alert to the Commission's activities, be ready to challenge them before the Court where we think

they are wrong (and we have had some successes), be prepared to 'terrorise' the Commission politically on the lines of the Bruges speech, and confront them directly when they try to move into really sensitive areas such as tax harmonisation, frontier control and above all any attempted invasion of the heartland of economic policy-making.

I think it would be useful for the note to have a wider circulation in Whitehall, with your endorsement of the need to respond firmly to the Commission's expansionary tendencies. Agree?

Yes - very much so.

C.D.P.

CDP

5 October, 1988.

RESTRICTED

Qz 06160

MR POWELL

FUTURE DEVELOPMENTS OF THE EC AND THE ROLE OF THE COMMISSION

Your minute of 20 July asked the Cabinet Office to put together a note on the areas where the Commission appear to be pushing forward the frontiers of their competence, including the part played by the ECJ in this process. The attached paper has been prepared in consultation with the Whitehall Departments concerned.

2. The increased activity of the Commission can be regarded as one aspect of the general evolution of the Community since 1984. Although therefore sections III-IV of the paper in particular address the issue of competence in a technical Treaty sense, it seemed worth broadening the analysis in the paper to encompass the principal lines of the Community's recent and prospective development and the Commission's role in that more generally. The opening section of the paper accordingly summarises the main developments since 1984 and the concluding sections consider some of the wider issues presented by the growth in Community activity.

R G LAVELLE

13 September 1988

Qz 06139

THE FUTURE DEVELOPMENT OF THE EC AND THE ROLE OF THE COMMISSION

I. INTRODUCTION

The purpose of this paper is to describe the main features of the new phase in the evolution of the Community which started in 1984; in so doing to assess, with an eye in particular to competence issues, the objectives, strategy and methods of the Commission and the role of the Council and the European Court of Justice; and to examine in terms of their acceptability to the United Kingdom the main categories of current Community activity.

2. Underlying the paper is the recognition

- that the Community is based on the premise of change and development;

- that the Commission has under the Treaty an independent and distinctive role in ensuring that the provisions of the Treaty and of Community legislation are applied and in being the source of formal proposals for legislation;

- that while some of the actions of the Commission are unacceptable to us there are others where it is to our advantage for the Commission to take the views and act as they do; and

- that within the framework of the Treaty the member states acting in the Council have the final say in the direction of the Community's development, its pace and the setting of priorities.

II. THE COMMUNITY'S DEVELOPMENT SINCE 1984

3. The Community achieved full Customs union in 1968 ahead of the Treaty timetable. The Hague Summit in December 1969 ensured that considerable momentum was maintained up to 1973. But a decade then followed in which economic recession, the strains of enlargement, the demands of the common agricultural policy and the long negotiation over budgetary imbalances combined to sap both energies and resources and to reduce the collective ability to chart a clear way forward. In the early 1980s, the graph of performance of the Thorn Commission, to quote Sir Michael Butler, never rose much off the bottom.

4. 1984 can increasingly be seen as a turning-point, both in the Community's fortunes and in the development of United Kingdom influence within the Community. For the United Kingdom, the most important development was the solution by the Fontainebleau European Council of the problem of budgetary imbalances, bringing about a key shift in the internal equilibrium of the Community. For the Community as a whole, it was a year which also saw the beginnings of CAP reform and budget discipline and the start through the establishment of the Adonnino and Dooge Committees of a substantial debate about the future development of the Community.

5. The Delors Commission which took office in early 1985 was of a markedly higher overall quality than its predecessor and rapidly added its own contribution. Over the ensuing period three major landmarks in the development of the Community can be singled out: the Commission White Paper on the Single Market (1985), the signature of the Single European Act (1986), and the completion of the negotiations on the future financing of the Community (1988). In addition, on 1 January 1986 the Community expanded from ten to twelve member states with the accession of Spain and Portugal.

a. The single market : the 1985 White Paper

6. The Commission's White Paper of June 1985 set out a comprehensive programme to remove all physical, technical and

fiscal barriers inside the Community, foreshadowing a series of some 300 proposals designed to achieve that aim by 1992. The objectives were those of the original provisions of the Treaty of Rome. The programme of completing the single market brought to the top of the Community's agenda a set of free-trading objectives which had for many years been central to the United Kingdom's European aims and which we had urged on the rest of the Community. However, it was clear from an early stage that the stress it placed on the idea of a "Europe without frontiers" was likely to prove awkward for us when the time came for detailed discussion of border controls and indirect tax approximation.

7. Much progress has now been made in agreeing the proposals in the White Paper; some 100 have been agreed, plus a similar number of other proposals with implications for the single market. The lion's share of this progress has been due to the successes first of the United Kingdom Presidency in the second half of 1986 and then of the German Presidency in the first half of this year. During the United Kingdom Presidency agreement was reached on 48 individual measures ranging from the right of establishment for general medical practitioners to standards for forklift trucks; substantial progress was also made on the liberalisation of air transport and the capital movements directive. Under the German Presidency, agreement was reached on 56 measures, including the full liberalisation of capital movements, mutual recognition of professional qualifications, the liberalisation of road haulage, public procurement and food law. Decisions by qualified majority - during our Presidency anticipating the provisions of the Single European Act (see paragraph 10 below) - have helped to speed up the rate of decision making.

b. <u>Institutional reform : the Single European Act</u>

8. Like those of the so-called People's Europe exercise, the antecedents of the Single European Act can be traced back to the establishment by the Fontainebleau European Council of the ad hoc Committees on a People's Europe (Adonnino) and for Institutional Affairs (Dooge).

9. The Adonnino Committee was asked by the European Council to consider what measures should be taken to strengthen and promote the Community's identity and its image. Its first report (to the Brussels European Council in March 1985) had an economic flavour, concentrating on freedom of movement for people and goods, border formalities and employment. Its second (to the Milan European Council in June 1985) proposed initiatives on a wide range of topics, including culture, media policy, youth/education/sport, health/social security/drugs, and strengthening the Community's image (flags/anthems/stamps). Both reports were approved in general terms by the European Council, which instructed the Commission and the member states, "acting within their respective powers", to take the necessary implementing measures.

10. The Dooge Committee reported back to the Milan European Council, which then set up an Inter-Governmental Conference; the latter met during the second half of 1985 and culminated in agreement on the Single European Act (SEA). To facilitate the completion of the Single Market, the SEA deliberately altered the voting rule from unanimity to qualified majority (QM) in a number of market related areas.

11. The SEA also introduced a number of new Treaty provisions relating to institutional arrangements, social policy, cohesion, research and development, and the environment; as well as the first formal Treaty reference to economic and monetary union, in terms making clear that any further developments requiring institutional changes in the monetary area would require Treaty amendment.

c. <u>Financial reform : the 1988 Brussels agreements</u>

12. In February 1987, the Commission's paper "Making a success of the Single European Act" set out to provide a comprehensive plan for the development of the Community up to 1992. It recommended strengthened agricultural budget discipline, including a system of stabilisers covering all main CAP regimes; improved budget management; an increase in the structural funds;

and a new structure and level of own resources. It effectively set the agenda for the subsequent negotiation on the future financing of the Community. The alliance between the Dutch, the Commission and ourselves ensured a conclusion at the February 1988 European Council that matched our major objectives in those negotiations.

d. Community activity since 1984 : a general assessment

13. Where do these developments leave us and Community competence? The following broad features may be noted:

a. the White Paper on the single market is in its substance a mixture of desirable mainstream reforms and a handful of proposals, to which the merger control proposal has subsequently been added, which present significant problems to the United Kingdom as well as many other member states. Given the powers already available in the Treaty the White Paper poses relatively few competence problems as such: the most difficult ones arise from the Commission's insistence on "Europe without frontiers" (see paragraphs 23-25);

b. of the revised methods of operation laid down in the SEA the provisions for increased QM voting have stepped up the pace of decision-making in the single market area; so far this has been in many respects beneficial: but the European Parliament (supported by the Commission) are in dispute with the Council over the interpretation of the provision in the SEA for delegating powers of execution to the Commission (see paragraph 29 below): and the Commission's preference for using Articles which involve QM rather than unanimity (see paragraph 33) has been evident;

c. the People's Europe (Adonnino Committee) recommendations on a wide range of topics while not caught up in the SEA were approved by the Milan European Council in June 1985 and have stimulated some

attempts by the Commission to push forward the boundaries of Community competence and thus of its own activities;

d. the agreement on future financing has put a cap on the cost of this stage of the evolution of the Community, with a major advance in the control of agricultural expenditure. It set firm parameters for the funding of Community policies up to 1992 with agreement on detailed provisions for budget discipline - to both of which the Commission and the Parliament are parties as well as the Council; and ensured the continuation of the Fontainebleau arrangements for the United Kingdom contribution.

14. Taking together the major areas of Community financing, the SEA reforms and the progress towards completion of the single market the balance of achievement since 1984 may be judged broadly positive both for the Community and for the United Kingdom. In a number of these areas our interests and the objectives of the Commission have been very similar. Some of the areas where we have faced and will continue to face difficulty are examined below. Not all potential difficulties arise because the Commission wishes to increase either its own or the Community's competence: for example, in the broadest sense, action on the social dimension is rooted in the Treaty, and actively promoted by a majority of the member states. That said, an active Commission can be expected to try to make full use of its existing powers and to seek to add to those powers. Delors himself has argued in an internal Commission document that in seeking to extend its competence, the present Commission is motivated not by a desire to extend its hegemony but rather by the so-called principle of "subsidiarity" - ie the view that the only tasks which should be dealt with at Community level are those which can be performed more efficiently there than by the member states acting individually. We will not, however, always share the Commission's view on where this line should be drawn.

15. The next section of this paper examines the areas where the boundaries of Community activity have been expanding or where there is pressure for them to do so. In putting forward initiatives in any of these areas the Commission will often not be acting only on its own account: it may well have the encouragement of some member states and/or the European Parliament. A later section of the paper attempts a broader categorisation of Community activity in terms of UK interests.

III. EXTENSIONS OF COMMISSION COMPETENCE

16. It is illuminating to distinguish the policy areas of recent attempted extensions of Commission competence from the techniques employed. The following paragraphs are presented accordingly.

A. Areas

i. Culture

17. The Treaty of Rome has no specific provision about culture. For many years cultural cooperation between the EC member states was based principally on the Council of Europe. Since the Solemn Declaration of the Stuttgart European Council in 1983 it has developed considerably. The decision of the Fontainebleau European Council of June 1984 to give the Community "a new dimension which would bring it closer to the citizens of Europe" and the positive response of the Milan European Council in June 1985 to the recommendations of the Adonnino Committee provided a basis for the Commission to take a series of actions in the cultural field, often funded by means of "actions ponctuelles" (paragraph 31 below). The establishment this year of a Cultural Affairs Committee with representatives from the member states should help to rein in the Commission a little in this area.

ii. Education

18. The Treaty does not refer to education as such, although Articles 118 and 128 refer to vocational training. Member states have nevertheless chosen to establish an Education Committee and to cooperate in education on the basis of mixed resolutions of the Council and of Education Ministers meeting within the Council of 1974 and 1976. These have allowed cooperation to develop - and expectations to build up - without addressing the question of competence head on. The United Kingdom firmly maintains that the Community has no competence over the broad sweep of education policy. The Commission have however sought to enlarge the scope of Community competence by pressing for higher education in general to be treated as vocational training: the ECJ in the Blaizot decision in February 1987 has given some support to the Commission by holding that most university education comes within

the scope of vocational training for the purposes of the Treaty. A more welcome development was the judgment in June 1988 in the Steven Brown case that educational policy as such was not "included in the spheres entrusted to the Community institutions", which should make it easier to resist further Commission initiatives in this field. The Commission also maintain that specific spending programmes can be adopted under Article 128 (simple majority), even though that Article refers only to laying down general principles: this issue is currently before the Court.

iii. Health and Social Security

19. The Treaty provisions on workers and trade in goods are sufficiently widely drawn to provide a base for expenditure on related activity in the health field. There has always been a great deal of Community activity which is related to occupational health and health care of workers generally and health related subjects have been included in the Community's research programme for some years. Health Ministers first met as long ago as 1977. Decisions on health and safety at work - an area where with some reservations we favour Community action - are within the Treaty and are taken by QM. Additional impetus has however been provided by various proposals put to the Milan European Council in June 1985 by the Adonnino Committee, by the White Paper on the Single Market, in which the Commission advocated inter alia the harmonisation of essential health requirements, and the initiative on cancer agreed in principle at the Milan European Council. No specific Treaty article can be identified as being appropriate for these proposals. Not surprisingly, there is strong support in the Council for action (albeit of a limited kind) in such high profile areas as AIDS and cancer and countering drug abuse. The United Kingdom has no objection in principle to EC cooperation over such health matters, provided that what is proposed has demonstrable practical value and there is no overlap with the work of other bodies.

20. The field of social security and the social services is potentially more sensitive. Some proposals in this area can be

given a solid Treaty base. Of these we have no difficulty with action linked to the freedom of movement of workers. Some activities, such as those designed to ensure British citizens get fair treatment elsewhere in the Community, can be welcome. Other proposals in this area, still within the Treaty, can be politically very sensitive and potentially expensive, eg on equal treatment for men and women (pension ages, paternity leave, widowers' pensions, integration of the disabled, day care for children etc). However they equally present major difficulties for other, notably Northern, member states. In addition there is a persistent threat of Commission initiatives outside the Treaty - for instance their apparent interest in using the study of demographic problems launched by the Copenhagen European Council as an excuse to start examining the complex of family-related problems including proposals to extend Community activities into the field of benefits for family support.

iv. <u>Competence in international economic organisations</u>

21. At least for trade in goods, Community competence in external trade policy is well established under Article 113 of the Treaty, and very much in the UK interest, because of the strong voice it gives the Community in international trade negotiations. In addition the Commission has generally directed EC trade policy towards objectives we favour. Attempts by the Commission to extend their role have not however always been welcome to the UK. For instance

i. the Commission have consistently taken a wider view of the scope of Article 113 than we would accept: in particular they contend that Article 113 applies to services as well as to goods. We have always reserved our position on this and in practice we have reached a modus vivendi whereby the Commission have not openly challenged our right to conduct bilateral negotiations eg on financial services while we have seen it as to our advantage in eg the GATT to allow the Commission to represent the Community's position, even on areas of national competence. For the reasons given below in

paragraph 22, the Commission's hand will tend to be strengthened over time and we may find it more difficult to sustain this balance;

ii. the Commission are following a deliberate policy of trying to enhance their role in international organisations (eg OECD, FAO) where Community competence is questionable or only partial. We have tended to resist such extensions of the Commission role, but on grounds of practicality and acceptability to other members of these organisations, rather than on competence grounds alone, in part because the ECJ would probably rule against us.

22. The ECJ has ruled that external competence is created implicitly by the adoption within the Community of common rules. The completion of the single market will therefore inevitably increase external competence, particularly in the services area. The precise scope of external competence created by a particular internal measure may, however, be disputed. The Commission will nearly always adopt a wider view. We will want to consider, case by case, where our policy interests lie.

v. **Frontier-related problems**

23. The Commission's - and particularly Lord Cockfield's - insistence on a rigid interpretation of the Treaty objective of establishing an area without internal frontiers poses a number of problems for the member states. These affect both policy areas outside the scope of the Treaty - particularly policies on third country immigration, terrorism and drugs - and the balance between common action and the rights of member states in the areas of indirect tax approximation, the control of firearms, public security and action in the public and animal health areas.

24. The Commission base their approach on a selective reading of Article 8A of the Treaty, an Article added by the SEA. This says that "the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services

and capital is ensured." Vitally this sentence is completed with the phrase "in accordance with the provisions of this Treaty." This phrase and the similar proviso to paragraph 1 of Article 8A ("without prejudice to the other provisions of this Treaty") have on our interpretation two important effects: first to preserve the availability of the existing exceptions to the Treaty on grounds eg of public security, and second not to widen the categories of persons entitled to free movement, so that third country nationals continue to be excluded. It is those phrases which the Commission choose to ignore. They would argue that Article 8A obliges the Community to eliminate border controls which constitute barriers to trade or to the exercise of Treaty freedoms comprised in the internal market; and that that implies that frontier controls for non-Treaty purposes (eg controlling drugs, terrorism and third country immigration) which have the effect of hindering the exercise of Treaty freedoms must also go, whether or not there are good reasons, eg of public health or security, for them to remain. Similarly the Commission are inclined to overlook the declaration in the SEA that its provisions do not affect the right of member states to take such measures as they considered necessary to control third country immigration and to combat terrorism, crime and the traffic in drugs.

25. We maintain that the qualifications in the Single European Act were specifically designed to protect action in areas which in our view and that of other member states lie outside Community competence. We do not accept the Commission's simplistic view that the complete removal of any control at the internal frontiers of the Community is (a) essential for the completion of the single market and (b) readily achievable in spite of immense practical problems. To seek to undermine their approach by a head-on challenge on frontier controls is likely to yield little; a more successful tactic will be to seek to expose and share with other member states the practical problems, to be ready to look for common approaches and action to reduce barriers even in the areas not properly within Community competence and to seek to get acceptance of our residual frontier controls where we believe

these to be necessary. Such an approach is proposed, for example, by the Chancellor of the Exchequer in a recent paper he has sent to his ECOFIN colleagues advocating a market-based approach as an alternative to the Commission's proposals for indirect tax approximation.

Areas : a summary

26. Of the areas sensitive to Commission aspirations and to a potential increase in Community competence frontier controls are politically the most difficult. There is undoubted rhetorical appeal in the Commission's insistence on the need to establish the Community as an area without internal frontiers. There is also a clear risk that if we do not accept that frontier controls must be reduced to the greatest extent possible our arguments will be held to be inconsistent with wholehearted support for the completion of the single market. However the Commission's argument is based on a partial reading of Article 8A of the Treaty and we can maintain that a full reading of this Article allows for controls to be maintained to protect national interests on matters outside the Treaty, and even within it where reasons eg of public security are paramount (cf firearms). There are also significant practical steps that we can take without giving away competence issues and protective requirements which we regard as essential: in the fiscal area we are protected by the unanimity rule.

27. In relation to international organisations we need to balance the advantages which are often to be gained by acting as a single unit against frivolous attempts to restrict the freedom of manoeuvre of member states. In the area of culture the main problems flow from the need to finance undesirable Commission initiatives. In education, health and social security the risk is that apparently desirable Community action will give the entree to the Community to affect major policy areas that are clearly completely outside the Treaty, eg schools, health services and pensions.

B. **TECHNIQUES**

28. The principal technical devices employed by the Commission in applying pressure for additional action on their own or the Community's account are set out below.

i. **Commission implementing powers through committees (Comitology)**

29. When making recommendations as to how a new policy should be carried out, the Commission tend to propose "advisory committees" rather than those types of committee under which their freedom to act would be constrained by the need to submit to voting by the member states. In proceedings before the ECJ the Commission are arguing against the Council that the only form of committee appropriate for the implementation of measures involving expenditure is the advisory committee; and the European Parliament is taking action against the Council over the decision on comitology agreed by the Foreign Affairs Council in June 1987. The Parliament and the Commission can be expected to continue to seek to extend their influence at the cost of the Council by interpreting in a prejudicial manner the rules on comitology.

ii. **Declaratory language**

30. The Commission clearly find it useful to build up a library of such language, validated by the European Council, which can thereafter be used at specialist Councils as justification for detailed Commission proposals. Alternatively they have attempted to secure Council resolutions on matters of doubtful Community competence (eg third country migrants) which have no binding effect in themselves, but which can subsequently be called in aid by the Commission to justify the adoption of measures having binding effect.

iii. **"Actions ponctuelles"**

31. Under this procedure, either the Commission or the European Parliament can enter in the budget for a given year lines which have no legal base for expenditure authorised by the Council. A recent example is planned expenditure of 1.125 mecu in 1988 and a similar sum in 1989 to combat the use of illicit drugs. The

individual sums involved are not large in the context of the Community budget, and the expenditure is subject to a number of constraints. But any use of this procedure plainly reduces the budgetary control exercised by the Council.

iv. Novel use by the Commission of existing powers

32. The Commission may seek to extend their powers by using existing Treaty provisions in a new way. A recent example has been the Commission's use of its powers under Article 90 of the Treaty to order the break up of monopolies in the telecommunications field (an objective which we favour). The Commission may sometimes be encouraged to adopt a more aggressive stance as a result of clarifications of the Treaty by the Court in its favour: in the defence field, for instance, a restrictive interpretation of Article 223 by the Court has encouraged the Commission to propose that non-strategic imports of military equipment should be brought within the common customs tariff. To argue the toss before the Court in such cases is likely to result only in further restrictions on our freedom of manoeuvre. In the particular case of military imports, we are instead seeking to ensure that a proposed suspension of duty under Article 28 is drawn widely enough to protect essential NATO defence interests.

v. Qualified majority voting

33. To maximise the use of QM voting, the Commission are taking advantage of the changes made by the SEA to propose a single legal base which requires a QM, and are challenging in the ECJ the substitution or addition by the Council of legal bases which would require unanimity. Recent examples include the Commission's decision to use Article 128 (simple majority only) as the legal basis of their proposals on higher education; and to propose that maximum use be made of the provisions, on the environment and research and development chapters of the SEA, which allow decisions to be made by QM within the framework of a measure agreed by unanimity. The Commission have since the entry into force of the SEA sought to insist on proposals being based on Article 100A, which we consider should properly be based on some

other Article. This applies, in particular, to proposals whose predominant objective is the protection of the environment and which we think should be based on Article 130S, which provides for unanimity.

Techniques : a summary

34. Of these techniques:

a. the use of declaratory language and resolutions of a general or sweeping nature (such as on People's Europe) often slipped into the conclusions of an informal Council without discussion to build up the "acquis" is potentially mischievous. This can be avoided in more formal conclusions, usually adopted by unanimity, through vigilance and a readiness to contest a doubtful text;

b. the Commission's aim of maximising the use of QM sometimes, as in recent environmental cases, has the potential to override the wishes of one or more member states, in areas of great sensitivity to us. These issues are considered further in Section IV below;

c. the "action ponctuelle" is the least easy to control - because the Commission usually choose items of new expenditure which the European Parliament will support - yet it is at the same time often unacceptable from both a financial and a policy point of view.

IV. THE ROLE OF THE ECJ

35. The Treaty provides that the Court of Justice shall ensure that in the interpretation and application of the Treaty the law is observed. To this end, the Court is empowered to review the legality of acts of the institutions on grounds of lack of competence, procedural infringements, infringements of the Treaty and misuse of powers. Member states may institute proceedings against the Community institutions in respect of these matters and in the last 4 years the United Kingdom has taken action in 14 cases (10 against the Commission, 3 against the Council and 1 against the Parliament). The United Kingdom has been successful in 9 of those cases in the sense that the court has annulled or declared unlawful the act being challenged, partially succeeded in one case, lost in 2 cases, partially lost in 1 case and is awaiting judgment in 2 cases.

36. As this shows, the Court is quite prepared to give judgment against the institutions when it considers their conduct unlawful and it is certainly worthwhile member states bringing such matters before the Court in appropriate cases. Caution needs to be exercised, however, in the choice of cases. In most of the cases which we have won success has turned on the particular facts of the case, the detailed interpretation of Community subordinate legislation or on the breach of some procedural requirement. We have been less successful in relation to points of major principle. Thus in the cases we brought against the Council in relation to the Hormones and Battery Hens Directives, we secured annulment of the Directives on the ground that the Council was in breach of essential procedural requirements, but the Court ruled against on the main issue in both cases, the adequacy of the Treaty base adopted by the Council. The Court supported the Commission's argument that Article 43 (which requires QM voting) is a sufficient legal base for agricultural proposals and that the additional citation of Article 100 (or now Article 100A) is unnecessary. But it remains to be seen how far this ruling depended on the particular facts and the wording and inter-relationship of the particular Articles concerned, or whether it established a general principle. Similarly, in the

proceedings which we and 5 other member states took against the Commission in relation to its decision relating to migration policies, we succeeded in having the decision annulled on the ground that the Commission had included within the decision certain matters relating to the migration of third country nationals outside the scope of the Treaty, but we lost on the question whether the Commission had power to make a decision at all.

37. An important recent development is that in the last 18 months the Commission have started proceedings in 12 cases challenging the legality of acts of the Council. During the same period the Parliament has commenced 3 actions against the Council. The Commission, and to a lesser extent the Parliament, is in this way seeking to use proceedings before the Court as a weapon to overturn measures hammered out in Council negotiations which depart from the Commission's proposals and do not accord with its interpretation of the Treaty. The Court has not given a substantive judgment in any of these cases and it remains to be seen, therefore, whether or not this will prove an effective weapon. Nine of these cases relate to the legal basis of the measure in question and may have implications for the voting procedures on the adoption of similar measures; more generally, they are likely to clarify the principles to be applied in selecting the Treaty base for measures adopted by the Council. Two of these cases raise important questions concerning comitology (see paragraph 29 above). An example of a case in which the Commission are challenging the legal basis adopted by the Council is their attempt to get an order declaring null and void the addition of Article 235 as a legal base for the Council Decision adopting the European Community Action Scheme for Mobility of University Students (ERASMUS). The Commission's proposal for that decision cited Article 128 (which relates to the laying down of "general principles" on vocational training and requires simple majority voting) but the Council added a reference to Article 235 (which requires unanimity). A decision in the Commission's favour would give a wide interpretation of "general principles" and the scope of Article 128.

38. Generally speaking the Treaty is open textured and its provisions are often susceptible to a number of interpretations. The Court interprets the Treaty in the light of its understanding of its purpose and with a view to the effective realisation of that purpose. As a Community institution, the Court's view as to the purpose of the Treaty and what is required to give it effect is likely to be closer to the Commission's than our own. A further point to note is that proceedings before the Court are likely to prove more effective against the Commission, and possibly the Parliament, than the Council. In the case of proceedings against the Council, we will have argued and lost the point in the Council negotiations and can expect to have lined up against us in the Court proceedings both the Council and the Commission and, possibly, some of the other member states who formed the majority when the Council adopted the measure in question. In the event, the scales are likely to be weighted against us. In the 1986 Budget case however we did succeed on a point of major principle ie that it was unlawful for the Parliament to adopt a budget which provided for a total increase in non-obligatory expenditure in excess of the maximum rate established by the Commission under Article 203 of the Treaty; as that case and the migration cases show, other member states and sometimes also the Council can be lined up in support in proceedings against the Commission and the Parliament, thus substantially enhancing the prospects of success. As a member state, the United Kingdom also has the right to intervene in all other cases before the Court of Justice whether they be direct actions or references from national courts. It is important that this right should be exercised in such a way as to seek to influence the judgments of the Court on major questions of competence as they arise.

39. While therefore we can and in appropriate cases should resort to the Court where in our view the Community institutions have exceeded or abused their powers, it is important to recognise that in relation to questions of Community and Commission competence the Court will tend to favour dynamic and expansive interpretations of the Treaty over restrictive ones. It

must also be recognised that the Commission will take every opportunity, whether by commencing proceedings themselves or submitting pleadings in other cases, to take full advantage of any perceived tendency on the part of the Court to favour their view on questions of competence.

V. THE GROWTH OF COMMUNITY ACTIVITY : SOME WIDER ISSUES

40. Section III of this paper was mainly concerned with recent evidence of pressures to extend Community competence which have not always been to our liking. However analysis of recent developments against our wider experience as a member of the Community suggests that more generally Commission proposals can be assessed in four main categories:

a. **Areas where we should welcome Community action, including a substantial role for the Commission**. This is where there is no effective alternative available and in general the quicker action can be taken the better. Examples include:

   i. the well-established role played by the Commission in external trade negotiations;

   ii. the broad sweep of the single market programme, especially in such areas as financial services, transport, standards and the liberalisation of public procurement: in some of these areas action by the Community may lead to some loss of national powers but on balance be nonetheless worth accepting because of its beneficial effects on the overall position of the Community and the member states;

   iii. management of the CAP on the basis agreed in the future financing negotiations: a close eye will still need to be kept on the evolution of agricultural policy including the annual price fixings, but in this area it suits the UK that the Commission should be able, and expected, to operate agricultural stabilisers autonomously and automatically, without seeking specific Council authority; and

   iv. state aids, for 'level playing field' reasons, given that UK state aids are proportionately far less substantial than those of our major partners

(Commission figures: Italy 5.4% of GNP, France 2.8%, FRG 2.6%, UK 2%).

b. Areas where action at the Community level is acceptable, within limits, but on which Community action is not a major United Kingdom priority. Examples include industrial policy, the environment, consumer protection, and research and development.

c. Areas where Community action is quite legitimate in Treaty terms, but where the policies being proposed by the Commission are fundamentally objectionable to the United Kingdom. Examples are the Commission's earlier proposals for worker participation and parental leave.

d. Areas where we are clear that competence should be reserved to member states or Community action is unacceptable. These include matters concerning education policy (going beyond cooperation) outside vocational training, health services, preventive border controls, tax harmonisation and other central areas of economic policy.

41. Even in areas where we welcome Community action we need to retain a critical sense of balance. For instance there may be options of approach which leave a varying degree of continuing role to the Commission. In addition proposals which in themselves are attractive may have knock-on effects. Thus while we clearly favour the liberalisation of capital movements, we need to be alive to the fact that the French are probably not alone in feeling that a logical counterpart would be greater harmonisation of tax arrangements, eg of savings. Similarly we need to be careful that the momentum created by the single market exercise is not capitalised on by the Commission in order to promote protectionist or other flanking policies of which we radically disapprove.

42. Conversely, the implementation of the liberalising, deregulatory approach to the single market, which is central to

our thinking, itself requires continuing exercise of judgment. As a general rule the ideal is that that approach should lead to a process of competitive deregulation, as member states vie to provide a favourable climate for business. But all member states, including the United Kingdom, will in some instances see advantage in the imposition of minimum standards, sometimes even harmonisation, rather than a complete free for all: that is what lies behind our own position on excise duties and, to some extent, on financial services. The Germans would doubtless see their bid for harmonisation of social regulations as a precondition for road haulage liberalisation as reflecting similar, although we would argue less responsible, concerns.

43. Where we do not have an effective veto and where the proposed Community action is of doubtful value or positively objectionable we have to operate with a clear eye to negotiating possibilities:

a. In areas clearly within Community competence we should seek to influence the shape of policies as far as possible to match our own views. This implies doing all we can to influence the Commission's thinking at a formative stage but as necessary working from an early stage to build with like-minded member states an effective anti-Commission coalition. In many cases the right course will be to suggest, as we have already begun to do in relation to the "social dimension", a coherent and constructive programme of action which would be acceptable to us.

b. In areas outside Community competence, we should consider on their merits the weight of the competence considerations and assess them alongside the substance of the proposed measure. While in general the merits of Community action and the UK's interest in it should be the primary consideration, there could be cases where resisting an extension of Community competence will be a determining factor. In particular we need to keep a careful eye on Commission attempts to undermine unanimity provisions. In

the right circumstances we should be prepared as now to pursue cases in the ECJ. In general we are likely to be more successful if we avoid seeming to be bent on an institutional crusade and can combine arguments of competence with alliances on the underlying policy issue with like-minded member states. Several member states, eg the Dutch, whose views on institutional issues are directly opposed to ours, may be unwilling to form alliances on the substantive policy at issue if they detect that an underlying UK motive is institutional in nature.

44. In those areas where we have effective veto powers through the unanimity provisions, it is essential, pace Lord Cockfield's insistence that such an approach is inadmissible, that we should exercise our right to pick and choose, considering carefully how far the differences between us and other member states concern means or ends. We will however generally fare better if we can avoid giving the impression that we are simply foot dragging on sovereignty and seek to engage support for alternative solutions. For instance on tax approximation we should make no bones about our rejection of the Commission's absolutist approach, while opening up realistic alternatives. On border controls we shall need to hold to the interpretation of Article 8A described in paragraph 25 above and concentrate on practical measures which minimise but do not abolish all border controls. On merger control we are still at the stage of exploring whether the proposal is capable of amendment in a way which renders it more acceptable than the likely alternative to a regulation - ie enhanced use of Articles 85 and 86 of the Treaty.

45. Most of all, we shall need to make clear our position on the heartland of economic policy. There can clearly be no question, as the Chancellor of the Exchequer made plain in OD(E)(88)12, of accepting the principle that the United Kingdom's right to set its own tax levels should be any further constrained by European Community law.

VI. CONCLUSIONS

46. This is a good time to take stock. We are going through a period of significant evolution in the development of the European Community. Important decisions require to be taken between now and 1992.

47. In the Community's evolution over the last few years there is much we should score by any standards as solid achievements in the UK national interest. The future financing exercise has put a cap on the cost of the Community and in particular a constraint on expenditure on new policies. It encompassed a major new step forward in control of the Community's former main expenditure growth area, the Common Agricultural Policy. For the UK, the achievement and maintenance of the Fontainebleau abatement mechanism represents a firm and abiding safeguard. On the single market there have, in the UK and German Presidencies in particular, been major strides forward in the mainstream development of the Community from liberalisation of capital movements to mutual recognition of professional qualifications. Much of this has been to our liking and done with the Commission's support.

48. Over the next Commission's life there will certainly be areas of major controversy for us. We already have a good idea of what they are. In most cases our broad objectives have been identified. During this period it will be prudent to maintain very close links with the Commission in the detailed evolution of proposals. Our new Commissioners will have a major influence in this process. We will also hope over this period to strengthen UK representation within the Commission. We have now the advantage of a UK Secretary General. He will, amongst many preoccupations, have in mind the need to improve the quality of economic analysis in Community proposals and get better coordination between the various parts of the Commission.

49. But we will need to remain alert to the hazards of evolution of Community activity throughout the policy spectrum. There will be others besides the Commission ready to strengthen the power of

the centre: certainly the European Parliament and also some member states, who do not share our views about the appropriate boundary between national and Community responsibility. The persisting hazard is a Community bid, under the banner of harmonisation or cohesion, to impose collective requirements inimical to the operation of market forces: putting at risk the hard earned benefits in terms of tax regime of the UK's economic policies. In the single market area it will remain necessary to be watchful for undesirable knock-on effects from apparently desirable policies; for a reversion to Community tendencies to regulation; and the possible emergence of protectionist pressures, eg creeping reciprocity requirements. In the particular areas in which we have identified real difficulties, eg tax approximation, merger control, frontier linked issues, social space, we will in some cases have the formal protection of a veto and others not. In either case we will need to retain a crusading zeal linked to effective alliances with like-minded member states. We must also ally with them in steering the Commission off some of the more objectionable techniques for avoiding Council control. In each case however our optimum posture will reflect clear UK objectives and a positive presentation.