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*Dear Mark,*

EMU IGC : BIG ISSUES

Thank you for your letter of 15 November to Jeremy Hill. The Attorney General and Solicitor General (the Law Officers) have considered the issues which you raise and have given the following advice.

Solidarity

The Law Officers agree that the reference to "solidarity" in draft Article 2 of the EC Treaty might be invoked to support expenditure proposals which divert resources to the poorer countries of the Community. But the references to cohesion and convergence in the same article could probably be used for the same purpose and it is doubtful therefore whether deletion of the reference to "solidarity" would achieve much. If a measure were proposed under Article 235 on the basis of these references, the main protection for the United Kingdom would be the requirement of unanimity under that article.

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Participation in stage 3 : the "whetherness" of the texts

The Law Officers note that the Chancellor stated in the House on 24 January :

" . . . . we cannot accept a Treaty that would bind us to move to a single currency or to a single . . . . . monetary policy without a separate decision at the appropriate time by the United Kingdom Government and Parliament."

The Law Officers consider that Article 109G achieves this (on the assumption that the list of articles in Article 109G.4 accurately reflects Treasury policy).

The Law Officers advise that draft Article B of the Common Provisions, draft Articles 2 and 3A of the EC Treaty and draft Articles 102A and 103.1 would not fetter Parliament's right of veto under Article 109G.2. They do not consider that, even taking into account such broad provisions as draft Article 2 and the current Article 5 of the EC Treaty, the United Kingdom could be challenged in the European Court of Justice if Parliament exercised its right of veto. Moreover, the United Kingdom would not be subject to a justiciable obligation which at some point in the future would compel the government of the day to seek to join stage 3 and either force a vote through Parliament or allow a free vote.

The Law Officers believe however that the relationship between the "non-coercion" clause in Article 109G.2 and the objectives and obligations in the other Articles they have referred to is an uneasy one.

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On the basis of the draft texts as they stand at present, the United Kingdom is committed at least to the objective of the establishment of economic and monetary union. The Law Officers note that the Treasury intend to seek the deletion in Article B of the words "including, finally, a single currency", and this (together with non-acceptance of the proposed Declaration on the transition to stage three) is certainly necessary if the UK wishes to say that it is not committed, as a signatory, to the objective of a single currency. The Law Officers also note that Article 3A.2 (which provides that the activities of the Member States shall include "the irrevocable fixing of exchange rates between the currencies of the Member States leading to the introduction of a single currency") is qualified by the phrase "as provided for in this Treaty and in accordance with the timetable and the procedures set out therein", and that this preserves the right of a Member State conferred by Article 109G.2 not to move to stage 3. But the Law Officers consider that the most natural construction of the texts as they now stand is that the United Kingdom would be committed to the objective of economic and monetary union, which in its perfected form would include a single currency, although the United Kingdom could not be obliged ever to move to that final stage. In other words, the United Kingdom could not reasonably argue that economic and monetary union was a vague objective which might or might not include a single currency.

The nature of the objective has implications for obligations elsewhere in the EMU texts, in particular draft Article 102A (obligation on Member States to conduct their economic policies with a view to contributing to the achievement of the objectives of the Community), and Article 103.1 (co-ordination of economic policies with a view to achieving the objectives of economic and monetary union).

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These are refined points. If the Chancellor feels that it is enough for him to say that the United Kingdom will have the right to decide whether to move to stage 3, the texts could remain as they are. But if the Chancellor wishes to go further, and say in the House of Commons that the United Kingdom does not itself have the ultimate objective of a single currency, then in addition to the proposed amendment to Article B of the Common Provisions and non-acceptance of the Declaration, Article 3A.2 itself should be amended to delete the reference to a single currency.

The Law Officers suggest that in any event the Treasury should also consider substituting for the opening words of Article 109G.2 ("The Council shall not oblige a Member State to participate in the third stage. . . .") the words "Nothing in this Treaty shall oblige a Member State to participate in the third stage . . . .". This would help to eliminate the implication of an underlying commitment to the third stage, although it is not essential for the effectiveness of the non-coercion clause itself.

Economic policy : convergence

The Law Officers note that the first objective here has been to ensure that the "broad guidelines" and multilateral surveillance procedures under Article 103 do not result in legally binding decisions. The Law Officers consider that this objective has been achieved in relation to Article 103 subject to two caveats.

First, there is a risk that the obligation in Article 102A, although providing considerable room for manoeuvre, could prove ultimately to be justiciable if a Member State were pursuing economic policies in blatant contravention of the Article 103.2 guidelines. Second, the Treasury should consider whether non-compliance with recommendations under Article 103 could have indirect effects, for example in the application of Community monies by the Commission.

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The Law Officers note that the second Treasury objective is to maintain budget confidentiality. You suggest that this has been achieved by the reference in Article 103.3 to "important measures taken in the field of their economic policy". The text enclosed with your letter does not, however, include the word "taken" and does not therefore secure this objective.

Excessive deficits

The obligation under Article 104B to avoid "excessive government deficits", although not directly applicable, will be in force from 1 January 1994 (Article 109C). If the provision remains as it is, it will not be possible for the Commission or another Member State to bring infraction proceedings in relation to a breach (Article 104B.11) but, as you point out, the breach could theoretically be relied upon in a domestic court. It is difficult to speculate about such proceedings in the absence of a concrete example but the Law Officers would not exclude the possibility that a domestic court might take into account a breach of Community law under Article 104B.1 or refer the matter to the European Court of Justice. Article 104B.11 only prevents infraction proceedings and not Article 177 references.

Independence of the Bank of England

The Law Officers note the Treasury objectives as explained in your letter and the possible fall-back position, whereby the Treasury might accept an obligation to "start the process" leading to the independence of the Bank before January 1994 provided (a) that process did not have to be completed unless and until the United Kingdom moved to stage 3 and (b) "starting the process" was a minimal obligation. The Law Officers draw attention to the fact that the requirement for Member States to "start the process" leading to central bank independence before 1 January 1994 will be justiciable in the European Court of Justice and that, as always, this involves an element of risk.

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But the Law Officers agree with your view that the preparation and publication of a consultation document on the proposed legislation ought to suffice.

I am copying this letter to Patrick Layden (Lord Advocate's Department), Martin Eaton (Deputy Legal Adviser, FCO), Tim Pratt (Deputy Treasury Solicitor), and to Paul McIntyre and Richard Pratt (HMT).

*Yours ever,*

*Juliet*

JULIET WHELDON

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