

*Fisher*

Foreign and Commonwealth Office

London SW1

6 October 1981

*Dear Peter.*

## EUROPEAN COMMUNITY: FISHERIES

*on Previous Part at flap*

In his minute to you of 10 August, which was copied to the Prime Minister and other colleagues, Ian Gilmour summarised the advice of officials on the legal and policy questions raised by the Commission's assertion at the July Fisheries Council that they were entitled in Community law not merely to approve or disapprove member states' conservation measures but also to require member states to comply with the Commission's own proposals on Total Allowable Catches (TACs) and quotas.

We concluded in correspondence that a formal legal challenge at that stage would not be in our fisheries' interests, that our legal position was not likely to be prejudiced if we rested on the refutation of the Commission's claim that we had already made, and that if the Commission sought to invoke the powers they were claiming in future we should decide our reaction on the balance of substantive advantage to us in each case. Where the substance of what they sought to do was acceptable, a formal reservation on the legal aspects might be enough. But if our fisheries' interests were at stake we might not wish to conform and the case might have to be resolved by the European Court of Justice. In letters of 17 and 27 August Ian Percival agreed that we should not mount an immediate challenge but drew attention to certain risks in this course. We accepted in any event that it might be necessary to return to this subject again.

The Rt Hon Peter Walker MBE MP  
 Minister of Agriculture, Fisheries & Food  
 Whitehall Place  
 London SW1A 2HH



It is now clear that we have not complied with the substance of at least two Commission proposals, concerning respectively our quota for the Isle of Man Fishery and the limitation of catches - until the Fisheries Council next met - to three quarters of the annual quotas for species other than herring. The Commission have warned of the possibility of Article 169 proceedings against us and perhaps other member states in respect of the second of these demands, although it presumably expired at the 29 September Fisheries Council. Officials have accordingly considered again whether we should ourselves take action against the Commission in the European Court before the deadline for an Article 173 action expires on 10 October. I enclose ... a note setting out their agreed advice on the relevant legal issues.

Taking account of their advice and the other factors reviewed by officials I would summarise the position as follows:-

- (i) There is a risk that if we do not challenge the Commission's claims within the set time limit we may be prevented from doing so later if the Commission bring a case against us. In terms of legal procedure the safest course would therefore be to initiate a challenge to the Commission's claims under Article 173 of the EC Treaty. Our chances of success would be no better than they were when Ian Gilmour wrote to you on 10 August.
- (ii) If, however, we did not now raise the matter under Article 173 and later the Commission were to bring a case against us under Article 169, we would probably not be precluded from deploying our arguments in the Court, and the Court would in practice deal with them.

/(iii) On



(iii) On the other hand, several other member states take the same view as ourselves on the Commission's claims and are in the same boat. The Commission are bound to think twice before taking infraction proceedings against all of us on so contentious an issue; equally, so far as we know, no other member state is contemplating Article 173 action.

(iv) The mini-package you secured on 29 September represents a substantial step forward in the CFP negotiations and the Commission are about to start on a series of bilaterals with the aim of making progress towards an overall settlement at the 26/27 October Council. They are unlikely to take action against member states while negotiations shew any sign of making progress, although they might do so if there were a complete breakdown.

In these circumstances I believe that it would go completely against the spirit now prevailing and your determination to work for a settlement at the next Council if we were to initiate a challenge to the Commission before then. Since it is not certain that we would get all we wanted from such a challenge, and since there is a reasonable chance that we should not be debarred from making it in the context of Article 169 proceedings if the Commission brought a case against us, I do not think we should initiate an Article 173 action before the 10 October deadline. I should be grateful to know whether you and other colleagues are content with this conclusion.

I am copying this minute to the Prime Minister, other members of OD(E), the Secretaries of State for Scotland, Wales and Northern Ireland, the Lord Advocate and Sir Robert Armstrong.

*Lord av*

*Humphrey*



MINISTRY OF AGRICULTURE, FISHERIES AND FOOD  
WHITEHALL PLACE, LONDON SW1A 2HH

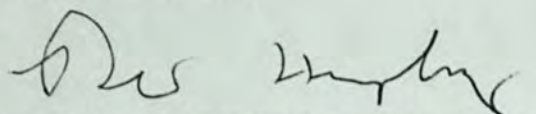
From the Minister

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The Rt Hon Humphrey Atkins MP  
Lord Privy Seal  
Foreign and Commonwealth Office  
Downing Street  
London SW1A 2AL

WM  
15/10

12 October 1981

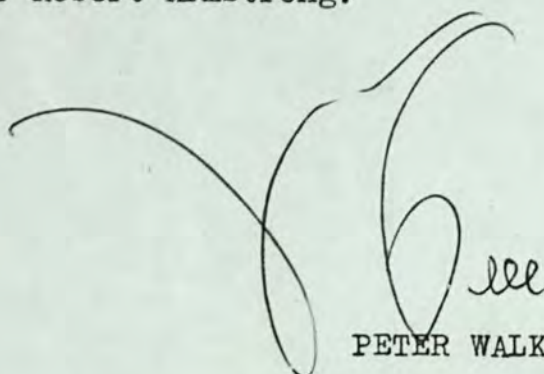
  
EUROPEAN COMMUNITY : FISHERIES

Thank you for your letter of 6 October covering a further note by officials about the possibility of instituting a case in the European Court of Justice under Article 173 of the Treaty, seeking to establish that the Commission exceeded their powers in their statements after the 27 July Fisheries Council when they claimed the right to impose the total allowable catches and quotas they have proposed for 1981 on member states. I note from the Attorney General's and Lord Advocate's recent letters that from the legal point of view they agree that it would be best not to institute such a challenge.

From the fisheries point of view also we would not wish to take the lead in questioning the Commission's actions at this stage if we could possibly avoid doing so. We made useful progress at the 29 September Fisheries Council and must hope to maintain the momentum towards an overall settlement this autumn. To succeed in securing agreement on a satisfactory deal we need the Commission's active co-operation and it would not help to secure it if we issued a direct challenge to them in the Court which they would be bound to defend vigorously. It is possible that the Commission have themselves reasoned similarly since it is noticeable that following the successful 29 September meeting they have so far refrained from issuing any statements like those we are concerned about which were made after the abortive meeting on 27 July.

For these reasons I therefore agree that it would not be right to issue a legal challenge under Article 173.

I am copying this letter to the Prime Minister, the Secretaries of State for Scotland, Wales and Northern Ireland, the Attorney General, Lord Advocate and Sir Robert Armstrong.

  
PETER WALKER

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12 OCT 1987

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Belfast BT4 3ST

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*19<sup>th</sup> October 1981*

Rt Hon Humphrey Atkins MP  
Lord Privy Seal  
Foreign and Commonwealth Office  
Downing Street  
LONDON  
SW1A 2AL

*Humphrey Atkins*

EUROPEAN COMMUNITY : FISHERIES

Thank you for sending me a copy of your letter of 6<sup>th</sup> October to Peter Walker.

While I accept that there is now a greater risk of Commission action against the UK under the article 169 procedures I support your view that the UK should not initiate at this time procedures against the Commission under article 173. I am satisfied that any risks involved are worth taking when set against the advantages of finally achieving agreement on the full CFP package.

I am copying this letter to the Prime Minister, other members of OD(E), the Minister of Agriculture, Fisheries and Food, the Secretaries of State for Scotland and Wales, the Lord Advocate and Sir Robert Armstrong.

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9 October, 1981

*Dear Humphrey,*

EUROPEAN COMMUNITY: FISHERIES

Thank you for sending me a copy of your letter of 6 October to Peter Walker. In substance, I agree with the assessment made in the "Further Note by Officials" and I therefore agree with the conclusion expressed in your letter. My only reservation about the Note by Officials concerns paragraph 8. I think that to say that in Article 173 proceedings there would be no possibility of isolating the quota issue from the TAC issue is to overstate the position. But I agree that it would be more difficult to do so in such proceedings than in Article 169 proceedings, where the complaint against us would presumably flow from our disregard of the quota allocated to us by the Commission. But this is a detail and does not affect my agreement with the general conclusion that the balance of the argument is against rushing into Article 173 proceedings. On a related but even more minor point, I take it that the reference in paragraph 9(c) of the Note to "any Court proceedings" is intended to be a reference to any such proceedings under Article 173.

I am copying this letter to Peter Walker and to the others to whom your letter to me was copied.

*Yours etc.* *Michael*

Rt Hon Humphrey Atkins MP  
Lord Privy Seal  
Foreign and Commonwealth Office  
London, SW1

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The Rt. Hon. Humphrey Atkins M.P.,  
Lord Privy Seal,  
Foreign and Commonwealth Office,  
Downing Street,  
London SW1A 2AL.

8 October 1981

EUROPEAN COMMUNITIES: FISHERIES

Thank you for copying to me your letter of 6th October to Peter Walker.

I consider that the jurisprudence of the European Court suggests that as a defence to infraction proceedings it would be open to us to argue that the Commission's decision addressed to us on which the infraction proceedings would be based was a legal nullity since the Commission had no power to make it. On the other hand it would not be open to us in a defence to proceedings under Article 169 of the EEC Treaty to argue against the legal merits of the particular decision that the Commission made.

It would appear that the principal argument available to us against the Commission's decisions in question is that the Commission had no power to reach them and to enforce them against a Member State and, accordingly, I would expect that our principal argument would remain open even if we did not seek to challenge the Commission's decision now.

In view of the decision of the Court in Case 804/79 there must be a considerable risk that a challenge to the Commission's decision will not succeed. In this connection a distinction has been drawn between the decision relating to TACs and that relating to quotas. For my part I find it difficult to distinguish these two from the point of view of Commission competence since I am not aware of any really equitable method of securing compliance with TACs except by a quota arrangement. From the legal point of view, therefore, the risk of taking action now is that the Court will affirm the Commission claim. In the recent case of R v Tymen in which I appeared for the United Kingdom there was some indication that the Court was sympathetic to our position and saw difficulty in the way in

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which the Commission have so far carried out their role in this matter. This is, of course, only an impression from the very limited reaction exhibited by the Court at the oral hearing and we must await the judgment to see if there will be any change in the Court's attitude.

In the light of these considerations and in the present circumstances I agree with the view that we should not initiate an action under Article 173 to challenge the Commission.

This letter is copied to the Prime Minister and others who received copies of your letter.

(Dictated by the Lord Advocate  
but signed in his absence).

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29 OCT 1981

