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The date on the advice below, which I am asked to confirm is 9th October. All possibility of action expired on 10th October. - the day the papers reached me. [N.B. - they were in one of the boxes I took for No. 10 to Chequers on the evening of 9th Oct. Having dealt with the other box first, I opened the second box the next morning, Saturday, 10th October)

The advice is - take no action at present.

I think it is fundamentally wrong advice. The basic question is whether the Commission should have these powers at all. To let that point of principle go unchallenged is, in my view a major error. In the meantime we are letting these powers continue as if they did exist. And we are waiting for the Commission to letter action against us on a particular expression of those powers. Then as I understand it - we can challenge the powers themselves. But what if the Commission does not take us to Court on that point? Their contention that they have those powers, however won and ever not been questioned. What a marvellous precedent for

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the Commission. What powers will they try to take next. why wip on a similar investigation to on the part of. member states to challenge them.

I agree with the Notary officials at 9.(a). Except that. I would substitute for the words 'the sole cause' - the words 'the only cause'.

Would you investigate what possibly there is of benefit or other or such a fundamental issue - out of time.

Margaret Thatcher

10th October 1985.

COMMISSION COMPETENCE IN RELATION TO FISHERIES MEASURES

Further Note by Officials

Introduction

1. The Note by officials of 7 August 1981 came to the following conclusions -

(a) A reasonable legal case can be presented that the Commission do not have the powers they claim in their Declaration of 22 July 1981 and in subsequent letters;

(b) the prospects of successfully contesting the Commission's claims in the European Court are not good in respect of TACs, but are better in respect of quotas;

(c) a challenge before the European Court under Article 173 could be mounted now, ie August, in respect of the Declaration and letters sent to us, or later, if the Commission, relying on these powers, purported to require us to take certain measures;

(d) our legal position is not likely to be prejudiced if for the time being we rest on our public repudiation of the Commission's Declaration.

The Commission Declaration and subsequent letters purport to impose requirements on Member States concerning TACs and quotas both in relation to the time up to the next Fisheries Council (ie 29 September) and in the longer term. 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 in respect of the second of these purported requirements, although it presumably expired at the 29 September Fisheries Council. There may be other requirements - which are not interim in nature - with which we will not wish to comply. 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.

The basic issue

2. The basic issue is the question whether a failure on the part of the United Kingdom to challenge the Commission's position under Article 173 within the time limits laid down in that Article would have the effect in Community law of preventing the United Kingdom from challenging that position by way of defence in a subsequent action under Article 169.

3. In considering time limits under Article 173 of the EEC Treaty the European Court has had regard to the desirability of achieving a balance between the need for review of the legality of acts of the institutions and the need to respect legal certainty. This compromise has been expressed by the Court as a fundamental principle of law in the following manner:

> "The limitation period for bringing an action fulfils a generally recognised need, namely the need to prevent the legality of administrative decisions being called in question indefinitely, and this means that there is a prohibition on re-opening a question after the limitation period has expired." (Germany v High Authority, Case 3/59 (ECR 1960 p 53)).

In Commission v Belgium, Case 156/77 (ECR 1978 p 1881) the Court held:

> "In view of the fact that the periods within which applications must be lodged are intended to safeguard legal certainty by preventing Community measures which involve legal effect being called in question indefinitely, it is impossible for a Member State which has allowed a strict time limit laid down in the third paragraph of Article 173 to expire without contesting by the means available under that Article the legality of the Commission's decision addressed to it to be able to call in question that decision by means of Article 184 of the Treaty when an application is lodged by the Commission on the basis of the second sub-paragraph of Article 93(2) of the Treaty."

It is true that the case concerned an action by the Commission taken under the expedited procedure of Article 93(2), but it is difficult to see how a distinction can be drawn between Article 93 proceedings and Article 169 proceedings for the purposes of the question we are now examining. In the Belgian case the Court went on to emphasise that:

> "in these circumstances to permit a Member State to whom a decision adopted under the first sub-paragraph of Article 93(2) has been addressed to call in issue the validity of that decision when an application referred to in the second sub-paragraph of Article 93(2) has been lodged, in spite of the expiry of the period laid down in the third paragraph of Article 173 of the Treaty, would be impossible to reconcile with the principles governing the legal remedies established by the Treaty, and would jeopardise the stability of that system and the principle of legal certainty on which it is based."

4. There is, however, some authority for the proposition that where the question before the Court is not one of the validity of a Community act, but one concerning its very existence, the time limits in Article 173 do not act as a bar to Member States raising the issue in their defence in infraction proceedings. In Commission v France, Cases 6 and 11/69 (ECR 1969 p 523) the Commission had brought proceedings under Article 169 of the Treaty against France for not complying with a decision which, in the opinion of the French, was taken in a field reserved to the competence of Member States. The Advocate-General Roemer, after pointing out that France could not rely on Article 184 (Case 156/77 has confirmed that Member States to whom individual decisions are made cannot rely on that Article), said that although there could be no question of a detailed investigation of the legality of the decision it was permissible to make an enquiry whether there were such serious and obvious defects in the making of a decision in respect of rules on jurisdiction that the decision could be disregarded without annulment by the Court. The Court appears to have confirmed the approach of the Advocate-General. Referring to the French claim that the Commission's decision was taken in a sphere which belonged exclusively to the jurisdiction of Member States, it said:

"If this allegation were valid, the above mentioned decision would lack all legal basis in the Community legal system and in proceedings where the Commission in the interests of the Community is taking action for failure by a Member State to fulfil its obligations it is a fundamental requirement of the legal system that the Court should investigate whether this is the case."

In the event France lost because in its investigation the Court did not discover any serious and obvious defects in the making of the decision. However, the fact that the Court was prepared to make the investigation showed that it would have been prepared also to decide against the Commission if France had been able to show obvious and serious defects.

5. The precise relationship between Case 156/77 and cases 6 and 11/69 is not entirely clear. But if the proposition laid down in Cases 6 and 11/69 still holds good - and there are good reasons for thinking that it does - the UK's argument in the present case would seem to fall squarely within the doctrine enunciated in Cases 6 and 11/69. The serious and obvious defects would be that the Commission is not competent to make proposals which are binding on the Member States, combined with the fact that it had not properly carried out its role in the process of collaboration and co-operation laid down in Case 804/79.

6. The conclusion to which this line of reasoning tends is that a failure to take action under Article 173 would not prejudice our ability to challenge the Commission's act in proceeding under Article 169.

7. On the other hand there is no doubt that from a purely procedural point of view it would be safer to act now under Article 173. The argument as to non existence of acts of Community institutions depends on a very fine technical distinction and there do not appear to be further precedents since Cases 6 and 11/69. The need for caution is all the more apparent if the wider implications of the Commission's claim about the nature of their proposals are borne in mind. Previous examples of action under Article 173 initiated for reasons of caution include the proceedings brought by the Federal Republic of Germany in the Budget case and the

proceedings brought by the United Kingdom in the Pigmeat subsidies case.

8. If it were decided that proceedings should be commenced under Article 173, it would be necessary to challenge the Commission's letters 1466, 1476 and 1477, together with the Declaration of 27 July. There would be no possibility of isolating the issue of the Commission's power to require Member States to comply with quota proposals from the issue of their power to require Member States to comply with their TAC proposals. Our assessment of the prospects of successfully contesting the Commission's claims in the European Court would not therefore be improved and there would be a serious risk of the Court entrenching the Commission's view of its powers.

Conclusions on main issue

9. On the main issue discussed in this Note, officials have come to the following conclusions:

(a) from the legal-procedural point of view the safer course would be to take proceedings before 10 October 1981 against the Commission for annulment under Article 173.

(b) If, however, we did not bring annulment proceedings under Article 173 and if (which is not certain) the Commission later brought proceedings against us under Article 169 for infringement, the United Kingdom could put forward to the Court the argument that the Commission's act had no basis in law and that the Article 173 procedure and time limit did not therefore apply. Our judgment is that while the Court might rule that we should nevertheless have followed the Article 173 procedure, it would also probably consider the substantive question at issue.

(c) It would be difficult in any Court proceedings to improve our chances of success by concentrating on quotas and avoiding TACs and there would therefore be a risk that any Court Judgment would entrench the Commission's view of its powers.

6 October 1981

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B/F

File

cc: OD(E)
FCO
HMT
LPO
(LPS)
+ SO
WO
NIO
Ld Adv.
CO
MAFF
DOT
Att-Gen

10 DOWNING STREET

From the Private Secretary

13 October 1981

EUROPEAN COMMUNITY: FISHERIES

On her return from Australia and Pakistan, the Prime Minister has seen the Lord Privy Seal's letter to Mr. Walker of 6 October, in which he recommends that we should not challenge the Commission in the European Court on the powers they claimed at the July Fisheries Council. She understands that it is now too late to challenge the actions of the Commission under Article 173. She has, however, commented that, if she had been able to see this correspondence earlier, she would have wished to question the Lord Privy Seal's recommendation, though she recognises that it has been endorsed by all the other Ministers concerned.

The Prime Minister feels that the basic issue is not - as the officials' note suggests - whether a failure to challenge the Commission's position under Article 173 within the time limits laid down would prevent our challenging the Commission by way of defence in any subsequent action under Article 169. She feels instead that the real issue is whether the Commission should assume, totally unchallenged, the fundamental power to require Member States to comply with Commission proposals where the relevant Council of Ministers has failed to reach agreement.

Moreover, the Prime Minister considers that to let this point of principle go unchallenged would be a major error. We are now letting the Commission exercise powers it claims as if they did exist and we are waiting for the Commission to take action against us on a particular expression of those powers, on the assumption that we can then challenge them. But there is always the chance that the Commission will not take us to the European Court; and the Prime Minister is concerned that this will mean that their contention that they have the powers they claim will then be won. She feels this will set an unfortunate precedent which the Commission may exploit, relying on a similar unwillingness on the part of Member States to challenge them.

BF

For all these reasons, the Prime Minister feels the only course is to challenge the Commission. She has asked if the possibility of taking some action on the fundamental issue, rather than on the specific act of the Commission in July, can be investigated. I should be grateful for your early advice on this.

/ I am sending

I am sending copies of this letter to the Private Secretaries to members of OD(E), to Muir Russell (Scottish Office), John Craig (Welsh Office), Stephen Boys-Smith (Northern Ireland Office), Christine Duncan (Lord Advocate's Department) and David Wright (Cabinet Office).

Yours

William Rickett

Stephen Gomersall, Esq.,
Lord Privy Seal's Office.

Prime Minister 1

Content to accept the Lord Privy Seal's recommendation at A ?

WR 9/10

Ref: A05696

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MR. ALEXANDER

European Community: Fisheries

(attached) In his letter of 6th October to the Minister of Agriculture, which was copied to the Prime Minister, the Lord Privy Seal seeks colleagues' agreement to his conclusion that the United Kingdom should let the procedural deadline laid down in Article 173 pass without taking action to challenge in the European Court the powers claimed by the Commission at the July Fisheries Council. At that Council the Commission asserted that, in the absence of agreement by the Council and in the light of a recent Court judgment, they were entitled in law to require member states to comply with their proposals for total allowable catches and quotas.

2. In the Ministerial correspondence on this question in August it was agreed that no Article 173 challenge was necessary at that stage, but that the position should be reviewed if the time came when it was no longer in our fisheries interests to go along with the substance of any measures proposed by the Commission in the exercise of their purported powers. Since then it has become clear that we have not complied with at least two Commission proposals relating to quotas, and the Commission have warned that they may bring Article 169 infraction proceedings against the United Kingdom in respect of one of them. As the Article 173 time limit runs out on 10th October, the question therefore arises whether we should contest the Commission's declaration before that date or face the possibility of infraction proceedings with the risk that we might then be debarred from doing so.

3. As the Lord Privy Seal's letter and the accompanying official note point out, there are two main grounds for letting the deadline pass without a challenge. First, the lawyers believe that we could if necessary still attack the validity of the Commission declaration in our defence against any Article 169 case by arguing that it had no basis in law and that the Article 173 constraints did not therefore apply. Secondly, the progress made at the 29th September Fisheries Council in agreeing the mini-package means that

it is both less likely that the Commission will now take action against us and that any Article 173 case initiated by us might impair the prospect of a final CFP settlement at the October Council.

A/ 4. The Lord Privy Seal accordingly concludes that the balance of advantage lies in not taking the issue to the Court for the present. The Minister of Agriculture is expected to concur. If the Prime Minister agrees, and no other Minister dissents, it would suffice for her to assent to this conclusion in a brief Private Secretary letter.

RSA

Robert Armstrong

9th October 1981