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Foreign and Commonwealth Office

London SW1A 2AH

20 October 1981

P. Amster

(2)

Dear Sir,

EC FISHERIES

Paul

You asked for advice on whether our failure to challenge the Commission's arrogation to itself of powers in the recent fisheries case might create a damaging precedent which the Commission could exploit more widely; and whether the possibilities of mounting a legal challenge on the fundamental question of the assumption of powers by the Commission in the absence of a Council decision could be investigated. The Lord Privy Seal entirely agrees that any general attempt on the part of the Commission to enlarge their power at the expense of the Council would be unacceptable.

On the first point we have never been in any doubt that the Commission's position in this fisheries case must be contested. The Minister of Agriculture did so as soon as the Commission asserted their claim at the July Fisheries Council and our rejection of the Commission's position has been formally reaffirmed in all our subsequent written dealings with them on this subject.

Furthermore, Lord Carrington made it clear to M. Thorn in the margins of the informal meeting of Foreign Ministers at Broom's Barn on 5-6 September that the Commission risked having a major constitutional row on their hands if they pressed their point of view. In August we informed the other Member States of our position. None has dissented; most have conveyed to the Commission similar reservations to our own.

It is significant that, despite their claims in July, M Thorn made no effort to defend the Commission's attitude when Lord Carrington spoke to him in September. Nor have the Commission pursued that line of argument since; it is notable that they did not reiterate their position at the September Fisheries Council.

/Although

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Although in certain fishing areas it has suited us well to manage the fisheries in a manner corresponding to the Commission's proposals, we have throughout made clear we were doing so on the basis of our own national, autonomous measures. In other areas we are disregarding the Commission's recommended quotas. If they were to bring a case against us in respect of this rejection of their requirements we would certainly contest it; if they do not it is their position, not ours, which is going by default. Several other Member States share our view of the Commission's claims and are adopting the same practical approach as ourselves.

In view of the importance of the wider issue to which the Prime Minister referred we also examined the possibility of instituting formal legal proceedings. We considered this in two contexts. Immediately after the Commission's initial general assertion of these powers in respect of Fisheries we considered whether we should mount a direct challenge to it as such before the European Court of Justice. The legal note circulated under cover of the Lord Privy Seal's minute of 10 August discussed the prospects of success in such a litigation. The conclusion reached was that, while a reasonable case could be presented, the prospects of a successful challenge in the European Court of Justice was not good in respect of Total Allowable Catches, though rather better in respect of their division into national quotas. Overall we considered that the balance of the judgment would be against us and could indeed confirm that the Commission had some of the powers which we and other Member States dispute. Ministers therefore felt that it would be unwise to take this risk, the more so in that the legal assessment was that this would not prejudice our ability to dispute the Commission's claims later in respect of specific requirements which it suited us to disregard.

More recently we considered again the question of whether, if the Commission took the UK to court over non-observance of their proposed quotas, our defence would be handicapped on procedural grounds by the fact that we had not challenged their original general assertion of powers. As you know, we concluded that our defence would not be fundamentally prejudiced and that the balance of arguments remained, as in August, against mounting a challenge ourselves before the European Court of Justice.

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However in other cases where we have considered that the balance of the argument pointed to our overall interests being prejudiced if we did not dispute, before the Court, an attempted extension of the Commission's powers, we have not hesitated to do so. Thus in September last year the Cabinet decided that we should initiate proceedings to challenge the Commission's interpretation of their powers under Article 90 and, in July this year, OD(E) decided that the United Kingdom should intervene in the Staple Dairy Products case to fend off a possible claim that the Commission could legislate in place of the Council, in a 'legal vacuum'. In the present case, the Commission's declaration was based on factors peculiar to the fisheries sector which could not easily be applied more widely, under the Treaties, to other sectors. We have responded accordingly through the reiteration of our legal reservations and the political and practical steps I have described above.

It is the Lord Privy Seal's view that the best way of following up the action already taken in the fisheries context is to maintain our express formal rejection of the validity of their action but not to initiate legal action, which might not be successful and which might in fact consolidate the powers the Commission have claimed.

The Prime Minister might wish to consider whether, in order to ensure that our standpoint is fully registered with the Commission at the highest level, she could take an opportunity to impress upon the President of the Commission the seriousness with which we would view any attempt by the Commission to maintain the line they took in July or to extend their powers in other areas of Community activity at the expense of the Council. A suitable occasion might be when M. Thorn visits London to prepare the European Council to be held at the end of November, as he is bound to do.

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).

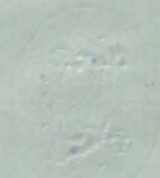
Yours truly
S J Gomersall

S J Gomersall
PS/Lord Privy Seal

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26 October 1981

EC Fisheries

The Prime Minister has seen and taken note of your letter of 20 October to Willie Rickett on this subject.

I am sending copies of this letter to the recipients of yours.

MA

S.J. Gomersall, Esq.,
Lord Privy Seal's Office.

MA