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Prime Minister.

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MR. ALEXANDER

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To note, I have asked the F.W. to put a suitable passage in the brief for your meeting with A. Room. You can decide at the time whether or not to draw on it -

European Community: Fisheries

The Lord Privy Seal has now replied to Mr. Rickett's letter of 13th October recording the Prime Minister's concern lest, in the current fisheries case, we should allow a fundamental shift in the balance of power between the institutions to occur by default. Mr. Gomersall's letter of 21st October to Mr. Rickett refers.

2. You might find it helpful to have some further information about the two non-fisheries cases mentioned in the eighth paragraph of Mr. Gomersall's letter as examples of issues on which the United Kingdom has taken legal action in the European Court in an attempt to curb the Commission's ambitions. I attach a factual note on the cases in question.

3. These two cases and the fisheries issue itself illustrate a more general problem, namely the conflict which often occurs between our desire on the one hand to limit the Commission's competence on legal and constitutional grounds and our wish on the other to see it exercised and even extended in ways that would benefit the United Kingdom's substantive interests in a particular field. There is the further complication that any legal challenge to the Commission can be mounted only in relation to a specific case, so that it may be difficult to address by this means more fundamental issues of general principle; and we have in any case to take account of the European Court's tendency to interpret the Treaties in a way that extends Community competence at the expense of national competence.

4. When OD(E) considered this issue shortly after the Government came into office (OD(E)(79) 1st Meeting, Item 1) it decided that it was inconsistent with the Government's commitment to the Community to oppose all extensions of Community competence on principle; instead we should tackle each proposal on its intrinsic merits. In some cases, this may simply mean the exercise of a power which, while clearly legal, has not previously been used. In others it



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may be a power whose legal basis is questionable. The Commission may have a natural tendency to want to extend its scope, though as the Three Wise Men pointed out, it has in recent years in fact lost considerable influence to the Council. The United Kingdom and the other member states will in turn resist any encroachment that they regard as dangerous, using legal or political means as the circumstances require.

5. In the immediate fisheries context, the Prime Minister may feel in the light of the Lord Privy Seal's reply and the earlier advice from the Law Officers that the necessary steps have been taken to safeguard our interests, short at least of the high level political approach recommended in the penultimate paragraph of Mr. Gomersall's letter. If the Prime Minister sees merit in tackling M. Thorn herself as proposed, you may wish to reply accordingly.

RTA

Robert Armstrong

27th October 1981



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NOTES ON THE ARTICLE 90 AND STAPLE DAIRY PRODUCTS CASES

Article 90

The Article 90 case was discussed in the Cabinet on 18 September 1980 (CC(80)33rd Conclusions Item 4). It arose from the adoption by the Commission of a Directive under Article 90 which sought to bring greater transparency into the financial relations between member states and their nationalised industries. Once it comes into force on 1 January 1982 it will, unless annulled by the Court, enable the Commission to examine these financial relations to establish whether any national aids had been granted contrary to the provisions of the Treaty. Given the relative openness of our own public sector financing procedures the United Kingdom would expect to gain on balance from the implementation of this Directive, which is primarily aimed at the covert subsidies provided by France and Italy to their industries. The Cabinet nevertheless decided that the United Kingdom should challenge the vires of the Directive in the European Court on the grounds that the Commission had exceeded their authority and assumed a responsibility which was the preserve of the Council. France and Italy have initiated similar proceedings, though for different and obvious reasons. The Court's judgement is due before the end of the year.

Staple Dairy Products

The Staple Dairy Products case was considered in OD(E) on 3 July 1981 (OD(E)(81) 9th Meeting). It stemmed from an attempt by the Commission to assert a power to take emergency action to fill a legal vacuum. In March 1980 the United Kingdom refused to agree to the prolongation of a Council Regulation on Monetary Compensatory Amounts (MCAs). The Regulation in question lapsed and a new Council Regulation was adopted

three weeks later. But the Commission issued a Commission Regulation establishing rules on MCAs for the period between the expiry of the old Council Regulation and the entry into force of the new one. They based their action on the thesis that the Commission had an inherent power to legislate to plug a legal gap arising from the failure of the Council to take a decision. The case is before the European Court on a reference from the High Court, in which Staple Dairy Products are suing the Intervention Board for Agricultural Produce. OD(E) decided that the United Kingdom should submit observations arguing that no hiatus had in fact existed, because previous Regulations governing MCAs remained in force and were sufficient to regulate the matter; and contending that, if these arguments were not upheld, the exercise of the Commission's power should be subject to a number of conditions.

Ministers' main preoccupation was to avoid any judgement of the Court which would tend to confirm or extend an inherent Commission power to act in a legal vacuum. At the same time they recognised that to argue openly against such a power might deprive the United Kingdom in future of the ability to press for unilateral Commission action even where such action was in our interest. The oral hearings on this case are likely to take place around the turn of the year; a judgement should follow shortly thereafter.

Sub

MR. WRIGHT  
CABINET OFFICE

EUROPEAN COMMUNITY: FISHERIES

The Prime Minister has seen and taken note of Sir Robert Armstrong's minute to her of 26 October on this subject. As you know, I have asked that a suitable passage be included in the brief for the Prime Minister's first meeting with M. Thorne in order that, if she wishes, she can raise the question of the powers of the Commission.

M. O'D. B. ALEXANDER

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30 October 1981