



PRIME MINISTER

MY APPOINTMENT AS A EUROPEAN COMMISSIONER

1. There has been an unfortunate development in relation to my appointment as a European Commissioner. The London Office of the Commission has just written to a Mr Mackinlay - a defeated Labour Party candidate in the recent Euro Election - in terms which he would almost certainly regard as supporting his contention that my membership of the House of Lords disqualifies me as a member of the European Commission. You should be aware of this and of the action which is being taken.
2. This issue is also being pursued by the Labour MEPs in the European Parliament and has been the subject of unhelpful speculation in the Press. Mackinlay wrote to you on 22 October enclosing a long statement setting out his views. That letter and its enclosure have been released to the Press. Mackinlay had also written to the London Office of the Commission. The Commission replied on 23 October. Mackinlay is likely to regard the reply as confirming his contention: others are likely to draw the same conclusion.
3. I do not think there is much point in arguing about the precise wording of the Commission letter. It is based on advice given by Noel, the Secretary General of the Commission and Noel in turn bases his case on advice given by the Commission's Legal Service and endorsed by previous Commissions. The nub of the matter is whether if I refrain from active participation in the affairs of the House of Lords, and a fortiori if I seek leave of absence, this is sufficient to satisfy the test "renonce à son mandat parlementaire" laid down by the Commission. The Foreign Office say it is. The Labour Party and Mackinlay say it is not. The letter from the London Office of the Commission, which translates the phrase in

[Barbara Castle has also noted whether to you]



question as "renounce his national parliamentary privileges", would seem to lean towards the Labour Party interpretation which broadly speaking is that leave of absence is not renunciation only temporary suspension: and that the mandate remains.

4. Clearly this matter must be resolved. It would be intolerable for me to go to Brussels and then find my appointment seriously called into question. The Foreign Office make reference to the fact that the matter can only be referred to the Court of Justice by the Council of Ministers or the Commission. But far from being a safeguard this is an added danger. Faced with a difficult, contentious and personal matter of this kind, the temptation will always be to refer the matter to the "impartial" decision of the Court: it is too much to expect that neither Council nor Commission would succumb to such temptation. We would then be faced with a long period of uncertainty making it impossible for me to do the job properly: the hazards involved in European as opposed to Common Law legal interpretation: and the risk of an adverse decision which would be a serious embarrassment for the Government and myself alike.

5. It is I believe essential that we should get Noel's agreement that if I seek leave of absence this is sufficient to satisfy his test. We are entitled to ask for this: because it is his intervention - no doubt innocent - and the intervention of his London office which has exacerbated the problem. We need also to get Delors' specific agreement. If we get this, we can rely on him as a man of honour to regard the matter as settled and not allow the Commission to re-open it. Thirdly it would be highly desirable immediately before the Commission appointments are confirmed "by general accord of the Member States" for a statement to be made on the record setting out the position so that morally at any rate the Council of Ministers would be stopped from questioning the validity of my appointment.



6. I have discussed this matter with the Foreign Office and the Cabinet Office. They are confident that the matter can be resolved on the basis I have set out above and are proceeding accordingly. The matter needs to be settled urgently. I am in course of appointing my Cabinet: and commitments are being entered into.
7. The Foreign Office will be submitting advice separately on the reply to be sent to Mr Mackinlay's letter to you.
8. I am copying this to the Foreign Secretary and, as it essentially involves a point of law, to the Attorney General.

A.C.

A C

29 October 1984

THE EC COMMISSION: OBLIGATIONS OF COMMISSIONERS* LEGAL CHALLENGE

1. Article 157 provides for the Court to rule upon the question of a breach of a Commissioner's obligations as set forth in that Article. But such a ruling may only be given when a breach has occurred, ie after the appointment takes effect, and only on application by the Council or Commission.

2. Article 177 provides a machinery by which a national Court can refer a question of Community law for the ruling of the ECJ. Although there is a theoretical possibility of an application to the national Court resulting in a reference as to the interpretation of Article 157, in practice it seems remote. An applicant would have difficulty in establishing locus standi and the national judges might well take the view that the matter should be left to the Council and Commission as provided by Article 157.

3. The other instances in which the Court can be asked to give a preliminary ruling - Article 182, in the case of disputes between Member States; and Article 228, in the case of a proposed agreement between the Community and a third party - have no relevance to this case.

4. Article 173 provides for the review by the Court of Justice of the legality of acts of the Council. The appointment of Commissioners however is "by common accord of the Government of the Member States" (Article 158) not by the Council as such. An individual may only bring a matter before the court under Article 173 if it concerns a decision addressed to him or of direct or individual concern to him. None of these conditions is satisfied.

5. Article 175 provides for a case to be brought by the other institutions of the Community, where there has been a failure to act (as opposed to a wrongful act which is covered by Article 173) on the part of the Council or Commission. The Parliament would appear to have the necessary standing to bring proceedings under

Article 175 if it contended that the Council or Commission should have applied to the Court under Article 157 (para 5 above). It is doubtful, however, whether Article 157 creates a duty for the Council or Commission to bring a case against a Commissioner. The contents of the Article imply that whether proceedings are initiated must be a matter of judgment and discretion. Even if the Parliament were able to frame proceedings under Article 175 they would be blocked if the Council or Commission, by a simple statement, indicated that they considered there were no grounds for proceedings under Article 175. This is because Article 175 provides for Court action only if the institution concerned has first been called upon to act and only if, within two months of being so called upon, it has "not defined its position".

6. FCO and Cabinet Office Legal Advisers are not aware of any other Treaty provision which could be invoked whether by an individual or the Parliament with a view to bringing this issue before the Court.

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10 DOWNING STREET

From the Private Secretary

MR. BIRCH
CABINET OFFICE

LORD COCKFIELD'S APPOINTMENT AS A EUROPEAN COMMISSIONER

The Prime Minister has considered Lord Cockfield's minute of 29 October on this subject and the subsequent letter from Mr. Budd giving the views of FCO and Cabinet Office Legal Advisers and an account of the action being taken to ensure that no sustainable case can be made against Lord Cockfield's appointment.

The Prime Minister is relieved to see that the Commission now appear to be co-operating in this matter and agrees with the other action proposed.

I am copying this minute to the Private Secretaries to the Lord Chancellor, the Attorney General, the Solicitor General and Sir Robert Armstrong.

SWA

C.D. POWELL
1 November 1984

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10 DOWNING STREET

From the Private Secretary

6 December, 1984.

Lord Cockfield's Appointment

Thank you for your letter of 4 December about the compatibility of Lord Cockfield's continued membership of the House of Lords and his duties as a Commissioner.

The Prime Minister has noted this. Lord Cockfield's appointment was not challenged when the matter was discussed at the European Council on 3/4 December.

I am sending copies of this letter to the Private Secretaries to the Lord Chancellor, the Attorney General, the Solicitor General, and to Richard Hatfield (Cabinet Office).

Charles Powell

C.R. Budd, Esq.,

Foreign and Commonwealth Office.



Foreign and Commonwealth Office

London SW1A 2AH

Prime Minister (2)

4 December, 1984

To note.

Sub
4/12

Dear Charles,

Lord Cockfield's Appointment

Please refer to my letter of 30 October about the risks of a challenge on legal grounds to Lord Cockfield's appointment to the Commission. You may wish to know where things stand.

As indicated in my earlier letter, we sought advice from the Commission on the compatibility of Lord Cockfield's continued membership of the House of Lords and his duties as a Commissioner. I enclose a copy of the Commission's response and a subsequent letter from the Council Legal Service. Their conclusion is, in the words of the Council Legal Service, that "a member of the Commission who is also a member of the House of Lords but has obtained leave of absence from the latter and does not in fact attend sittings of the House during his terms of office as a member of the Commission is not to be considered as engaging in another occupation"

We have taken steps to ensure that M. Delors is aware of Lord Cockfield's intention to take leave of absence from the House of Lords and of the Commission's findings. We have also informed the governments of Member States. When Foreign Ministers meet in the margins of the 17/18 December Foreign Affairs Council to confirm the appointments, we shall also ask for the Commission's advice to be written into the minutes of the meeting.

As you know, much of the interest in this issue was provoked by Labour members of the European Parliament. The Legal Affairs Committee of the European Parliament debated the issue last week and concluded that Lord Cockfield's leave of absence would provide sufficient guarantee of his independence. A draft resolution stating that it is necessary for Lord Cockfield to take leave of absence will go to the Parliament's Plenary Session on 10-14 December, to comply with the terms of the Treaty. We shall not, therefore, be able to avoid a further public airing of views on the subject, though the final outcome is likely to be a vote calling on Lord Cockfield to do what he anyway intends to do: take leave of absence. There appears to be no question of an attempted legal challenge to the appointment in the European Court of Justice. The Court has already told Carol Tongue, MEP, that she had no standing, as an MEP, to bring a case.

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I am copying this letter and its enclosures to the Private Secretaries to the Lord Chancellor, the Attorney General, the Solicitor General and Sir Robert Armstrong.

Yours ever,

Colin Budd

(C R Budd)
Private Secretary

C D Powell Esq
10 Downing Street

CONFIDENTIAL

Bruxelles, le 6 novembre 1984

SG(84)D/14259

Dear Michael,

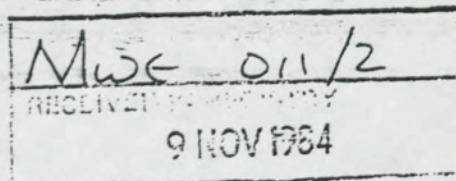
A la suite de notre entretien du 30 octobre dernier, je vous transmets l'avis du Service Juridique de la Commission sur la situation de Lord COCKFIELD. Comme vous le verrez, cet avis détaillé (rédigé volontairement sous une forme impersonnelle) aboutit à la conclusion qu'il n'y a pas incompatibilité entre les fonctions d'un Lord en situation de "Leave of absence" et le mandat de Membre de la Commission, encore que ce congé dispense essentiellement le Lord de ses fonctions législatives, mais laisse subsister quelques fonctions accessoires, de caractère plutôt honorifique. Celles-ci ne nous paraissent pas de nature à constituer une "activité professionnelle" au sens de l'article 10 paragraphe 2, alinéa 3, du Traité de fusion.

Dans l'établissement de cet avis, le Service Juridique de la Commission a pris contact avec le Service Juridique du Conseil, auquel l'avis ci-joint est également transmis.

Yours sincerely,

E. NOEL

p.j.



Son Excellence
Monsieur l'Ambassadeur
Sir Michael BUTLER, KCMG
Représentant Permanent de la Grande-Bretagne
auprès des Communautés Européennes
Rond Point Schuman, 6
1040 BRUXELLES

NOTE

Subject : Incompatibility between the functions of a Member of the Commission and the exercise of a national parliamentary mandate

- "Leave of absence" granted by the House of Lords in order to avoid incompatibility.

1. In the view of the Legal Service there is a clear incompatibility between the function of Member of the Commission and Member of a national Parliament arising out of the third paragraph of Article 10 (2) of the Treaty establishing a single Council and a single Commission of the European Communities (Merger Treaty)⁽¹⁾. In its first sentence this provision reads as follows :

" The members of the Commission may not, during their term of office, engage in any other occupation, whether gainful or not. "

The activity of Member of Parliament is an occupation which a Member of the Commission could exercise only at the expense of the time available for its work as a Commissioner. In addition the Member would be required to serve, at one and the same time, interests which are different and which may even be contradictory, i.e. the interests of one Member State as against those of the Community. The Member would not be able to comply with the second paragraph of Article 10 (2) of the Merger Treaty nor would he be able to give the solemn undertaking laid down in the second sentence of Article 10 (2) 3.⁽¹⁾

(1) N.B. Article 10 (3) in the English version published by the Communities in 1978.

2. It follows that if a Member of a national Parliament wished to exercise the functions of a Member of the Commission he would be obliged to give up his parliamentary mandate. In the United Kingdom it is possible for a Member of the House of Lords to disclaim (for instance if he wishes to sit in the House of Commons).

3. The incompatibility between the two functions could be avoided if statutory instruments existed in the Member State which enabled the Member of the national Parliament to be discharged of any obligations and responsibilities inherent in the parliamentary mandate and to lose the corresponding rights.

4. In the United Kingdom the Standing Orders of the House of Lords provide for "Leave of absence". The instrument and the procedure can be briefly described as follows ⁽¹⁾ :
 - in order to avoid the general obligation to attend the sittings of the House leave of absence may be granted by the House;
 - the request may be made by the Member at any time for the remainder of the Parliament;
 - when a new Parliament is called, a particular procedure enables the situation of those who were on leave of absence to be clarified;
 - a Member who has been granted leave of absence "is expected not to attend the sittings of the House". He may however take the Oath of Allegiance (which is a condition sine qua non for attending and voting and can be taken at any time during a Parliament);
 - if he does not attend the sittings the Member on leave does not receive any reimbursement of expenditure (members receive no salary);

(1) Paragraph 20 of the Standing Orders of the House of Lords.

- Members on leave continue to benefit from the following advantages :
 - . use of certain facilities of the House (Library, Dining Room, etc..)
 - . being able to sit on the steps of the Throne during a sitting of the House
 - . receipt of copies of documents of the House
 - . obtaining certain facilities of a protocol nature.

- if a Member on leave of absence wishes to attend a sitting of the House he must give notice one month before the sitting; the leave then ends automatically.

5. In order to be able to assess the consequences of a leave of absence with regard to the exercise of the functions of a Member of the Commission, it is necessary, first of all, to see what the functions of the Members of the House of Lords in general are.

Members of the House of Lords are advisers to the Queen. This function, which includes the right of individual access to the Queen, is no longer of any importance.

The Lords benefit from immunity from arrest on civil process.

The Members participate in the legislative process and, if they belong to the judicial body of the House, in the judicial process.

These last two functions are the only ones which are important and relevant in the present context. Both are exercised by the Members of the House in attending the sittings of the House (and its Committees). These functions cannot, therefore, be exercised by a Member who has been granted leave of absence.

Conclusion

On the assumption that there are no other responsibilities and obligations of a Member of the House of Lords which require time and may cause a conflict of interests, leave of absence granted by the House of Lords before the beginning of a mandate as Commissioner for the remainder of the Parliament and renewed for a new Parliament as long as the mandate as Commissioner runs would resolve the problem of incompatibility.

Leave of absence does not prevent the Member from taking the Oath of Allegiance in a new Parliament, i.e. the promise to serve the Queen; this would, however, be incompatible with the solemn undertaking to be given by each Member of the Commission. The Member who has been granted leave of absence should, therefore, not take the Oath of Allegiance. There is no obligation to take it. It only enables a Member to attend sittings of the House and to vote.

THE LEGAL ADVISER TO THE COUNCIL
OF THE EUROPEAN COMMUNITIES

Hans-J. GLAESNER
Director General

1048 Brussels, 23 NOV. 1984
Rue de la Loi, 170
Tel. 736.79.00

12822

H.E. Sir Michael Dacres BUTLER, GCMG
Ambassador

Permanent Representative of
the United Kingdom

Rond-Point Schuman, 6
1040 - BRUSSELS

Copy

Mr Williamson

Mr Penwick

From Sir Michael, -

Subject: Situation of Lord Cockfield

Mr Jilder

hms

2/14

I understand that you would like to have confirmation in writing that the Council Legal Service agrees with the conclusion of the Commission's Legal Service mentioned in Mr. Noël's letter to you of 6 November 1984.

In our opinion a member of the Commission, who is also a member of the House of Lords but has obtained leave of absence from the latter and does not in fact attend sittings of the House during his term of office as a member of the Commission, is not to be considered as engaging in another occupation within the meaning of the first sentence of Article 10, paragraph 3 of the Merger Treaty. I hope that this is sufficient for your purposes.

Sincerely yours

Hans-J. Glaesner

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NBPM
CDP
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THE PRIME MINISTER

LORD COCKFIELD'S APPOINTMENT AS A EUROPEAN COMMISSIONER

1. I have seen a copy of Lord Cockfield's minute to you of 29 October and also of Mr Budd's letter of 30 October to Mr Powell reporting the advice which has been given by the Foreign and Commonwealth Office and Cabinet Office Legal Advisers.
2. I agree that, if Lord Cockfield seeks leave of absence from the House of Lords for the duration of his appointment, his position as a Peer will not be incompatible with his duties as a Commissioner and will not amount to him engaging in any other occupation for the purposes of Article 10 of the Merger Treaty. The confirmation of the Secretary General of the Commission that, if Lord Cockfield took leave of absence for the duration of his mandate, this would fully meet the requirements of the Treaty, will greatly assist in putting the position beyond doubt.
3. I also agree that it would be very difficult for a legal challenge to Lord Cockfield's appointment to be brought before the Court otherwise than by the Council or Commission. One possibility which is not mentioned in the Note attached to Mr Budd's letter to Mr Powell is that an individual or company to whom a decision is addressed by the Commission, signed by Lord Cockfield, might challenge the validity of that decision under Article 173 EEC on the grounds that Lord Cockfield's appointment was invalid. I would think it unlikely, however, that such a challenge would be made. It is most unlikely that it would succeed in the Court.

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- page two -

4. I am copying this minute to the Lord Chancellor, the Foreign and Commonwealth Secretary and Lord Cockfield.

M.H.

1 November 1984

CONFIDENTIAL

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d Ferro Com: R2.

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31 NOV 1984



CONDIRETTORE

bc: Mr Powell, 10 Downing Street

CONFIDENTIAL

Mr Stapleton
Miss Lambert

Qz.04004

LORD COCKFIELD

CDP
3/11

YOUR NOMINATION TO THE EUROPEAN COMMISSION

Here is the confirmation that Monsieur Noel, the Secretary General of the Commission, considers that, when you take leave of absence from the House of Lords, this will fully meet the requirements of the Treaty. You will note that we shall be receiving a formal letter, agreed by both the Commission and Council legal services, confirming this position.

D F Williamson

D F WILLIAMSON

31 October 1984



Foreign and Commonwealth Office

London SW1A 2AH

30 October 1984

Prime Minister

ms

You will want to be aware of this problem - see also Lord Cockfield's ~~the~~ minute attached.

Dear Charles,

But it is well on the way to

Lord Cockfield: Compatibility of Membership of the European Commission with Membership of the House of Lords to resolution.

You asked for advice about a number of recent press stories which have suggested that the propriety of Lord Cockfield's nomination as a Commissioner was to be challenged in the European Court of Justice. You will also now have seen Lord Cockfield's own minute to the Prime Minister.

CDP
30/x.

attached -

The background to this story is that Carol Tongue (Labour MEP for London East) wrote a letter to the Court last week asking for a ruling on her contention that a life peer, as a legal member of a national legislative body, could not be a Commissioner. In addition, a Dutch Liberal MEP, Floris Wijsenbeek, has said that he will raise the question at this week's meeting of the Legal Affairs Committee of the Parliament, with support from the German Chairman of the Parliament's Credentials Committee (a Socialist MEP). Mrs Castle has, as you know, also written to the Prime Minister.

It is the view of FCO and Cabinet Office Legal Advisers that there is no inherent incompatibility in being a member of the Commission and at the same time a member of the House of Lords. The relevant provision of the EEC Treaty is Article 157, of which I enclose a copy. The essential elements of the obligation (in the first sentence of the final paragraph of the Article) are that a member of the Commission may not engage in any other occupation. In the view of our Legal Advisers the key word here is engage. Membership of a non-elected House is quite different from membership of an elected legislature. In the past, any member of the House of Commons appointed to the Commission has had to resign his seat. Lord Cockfield, as a life peer, could not resign even if he wished to do so.

The issue which will determine the compatibility of Lord Cockfield's membership of the House of Lords with his membership of the Commission is the extent to which he takes

/part



part in the House's activities. Were he to draw an attendance fee or speak in debates there would be a real prospect of a successful legal challenge. Were Lord Cockfield to take his seat during debates, even on the cross benches and without taking part in the debate or any vote, we believe there is a risk that that could be represented as "engaging" in another occupation and therefore as contrary to the provisions of the Treaty.

Lord Cockfield has made clear from the outset that he would take no active part in the affairs of the House of Lords once appointed. To make his position absolutely clear, he has now decided to seek leave of absence from the House of Lords for duration of his appointment.

Our Legal Advisers consider it would be very difficult for a legal challenge to Lord Cockfield's appointment to be brought before the Court otherwise than by the Council or Commission (see the attached note which sets out the position in greater detail) and that, if Lord Cockfield takes leave of absence as proposed, it is most unlikely that such a challenge would succeed in the Court.

For the reasons set out in Lord Cockfield's minute to the Prime Minister, we are determined to minimise the risk of any case being brought. The opinion given last week by the Commission Legal Service, and injudiciously passed on by the Commission Office to the Labour Euro-candidate Andrew Mackinlay, was ambiguous. It seems to have been written with elected Members of Parliament in mind and on the basis of past precedent. It took no account of Lord Cockfield's position as a Life Peer.

In order to clarify the position, Sir Michael Butler has now spoken on instructions to the Secretary-General of the Commission, Monsieur Noel. Noel confirmed that, if Lord Cockfield took leave of absence for the duration of his mandate, this would fully meet the requirements of the Treaty. To make doubly sure, he proposes to get the Commission Legal Service to agree with the Council Legal Service on the text of a formal letter in this sense which he will send to Sir Michael Butler.

We have also instructed Sir John Fretwell to let Monsieur Delors know that Lord Cockfield will be taking leave of absence from the House of Lords and of the action we have taken with the Commission. We shall ensure that other Member States are unaware of the formal letter before they meet (in the margins of the 17/18 December Foreign Affairs Council) to appoint the new Commissioners. Member States will thus have been made aware of Lord Cockfield's intention to take leave of absence and of the Commission's Services view that this constitutes full compliance with the Treaty before they agree to his appointment.

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I am copying this letter to the Private Secretaries
of the Lord Chancellor, the Attorney General, the Solicitor
General and Sir Robert Armstrong.

Yours ever,

Colin Budd

(C R Budd)
Private Secretary

C D Powell Esq
10 Downing Street

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Article 157

(Article repealed by Article 19 of the Merger Treaty)

[See Article 10 of the Merger Treaty, which reads as follows:

1. The Commission shall consist of thirteen members, who shall be chosen on the grounds of their general competence and whose independence is beyond doubt.*

The number of members of the Commission may be altered by the Council, acting unanimously.

Only nationals of Member States may be members of the Commission.

The Commission must include at least one national of each of the Member States, but may not include more than two members having the nationality of the same State.

2. The members of the Commission shall, in the general interest of the Communities, be completely independent in the performance of their duties.

In the performance of these duties, they shall neither seek nor take instructions from any Government or from any other body.

They shall refrain from any action incompatible with their duties. Each Member State undertakes to respect this principle and not to seek to influence the members of the Commission in the performance of their tasks.

The members of the Commission may not, during their term of office, engage in any other occupation, whether gainful or not. When entering upon their duties they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom and in particular their duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits. In the event of any breach of these obligations, the Court of Justice may, on application by the Council or the Commission, rule that the member concerned be, according to the circumstances, either compulsorily retired in accordance with the provisions of Article 13* or deprived of his right to a pension or other benefits in its stead.

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Ho/legal Aowson
Mr Renwick

CONFIDENTIAL

ELSKBY 301500Z

Mr Williamson
Cabinet Office

FM ORKEP BRUSSELS 301530Z OCT 84
TO IMMEDIATE FCO
TELEGRAM NUMBER 3532 OF 30 OCTOBER
INFO IMMEDIATE PARIS (PERSONAL FOR AMBASSADOR)

Mr Birch

YOUR TELNO.491
LORD COCKFIELD'S APPOINTMENT

1. I SPOKE TO NOEL ACCORDINGLY. HE CONFIRMED THAT, IF LORD COCKFIELD TOOK LEAVE OF ABSENCE FOR THE DURATION OF HIS MANDATE, THIS WOULD FULLY MEET THE REQUIREMENTS OF THE TREATY. TO MAKE ASSURANCE DOUBLY SURE HE PROPOSES TO GET THE COMMISSION LEGAL SERVICES TO AGREE WITH THE COUNCIL LEGAL SERVICES ON THE TEXT OF A FORMAL LETTER IN THIS SENSE WHICH HE WILL SEND TO ME.

2. AS REGARDS PUBLIC STATEMENTS (YOUR PARA 4) NOEL EXPRESSED THE PERSONAL VIEW THAT THE ONLY ONE REQUIRED WAS THAT BY LORD COCKFIELD HIMSELF ABOUT HIS LEAVE OF ABSENCE. IT WOULD BE BETTER FOR THE UK GOVERNMENT TO CONFINE ITS ACTION TO CHECKING PRIVATELY THAT THERE WOULD BE NO PROBLEMS WITH OTHER MEMBER GOVERNMENTS BEFORE THE CONFERENCE OF MEMBER STATES.

FCO ADVANCE TO:
FCO - RENWICK
CAB - WILLIAMSON

BUTLER