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17 November 1980

EUROPEAN COUNCIL, LUXEMBOURG

1-2 DECEMBER 1980

COMMON JUDICIAL AREA

Brief by Foreign and Commonwealth Office

OBJECTIVE

To give no encouragement to any French attempt to revive interest in proposals for a European Common Judicial Area.

POINTS TO MAKE

1. UK not enthusiastic about possibility that draft Convention on Cooperation in Criminal Matters (basically extradition) should come into force with less than 9 ratifications. If others decide to go ahead with such a Convention, they should not count on UK joining; and should therefore not require a high number of ratifications.

2. UK is opposed to further work on Common Judicial Area (ie going beyond extradition). Difficulties in reconciling common law and continental legal systems will make future work increasingly unprofitable. In civil law field especially also danger of duplicating work of other bodies, eg Council of Europe, Hague Conference on Private International Law.

BACKGROUND

Reference

Correspondence between the Lord Privy Seal and the Home Secretary following the Dutch decision

/ 3. President

3. President Giscard launched the idea of a Common Judicial Area among the Nine at the European Council in December 1977: criminals should not be allowed to profit from the free movement between European countries provided for by the Treaty of Rome. The French later proposed that the Common Judicial Area should include civil law.

4. The Council agreed that President Giscard's proposals should be considered. A group of officials from the Nine met within the framework of Political Cooperation and negotiated a draft Convention on Cooperation in Criminal Matters. The Convention embodies the principle that States should either extradite or consider prosecution of suspected criminals. Initially the draft Convention seemed likely to raise serious problems for the UK. It would have required us to abandon some of the traditional features of our extradition system, eg the establishment of a prima facie case against the fugitive. However, the rest of the Nine proved accommodating on this and other points; and the draft Convention as agreed by officials is now acceptable to the UK. It would still, however, require us to take much wider extra-territorial jurisdiction than exists at present with consequent practical difficulties, because of the need to call witnesses in UK courts. As it stands, the treaty might have some value, but it is by no means essential to us.

5. The UK was ready to sign the Convention at Rome in June; but the Dutch, who had given no hint of this in the course of the negotiations, announced that they would not sign the Convention. Their stated objections to the Convention (and to whole concept of a Common Judicial Area) were that it was unnecessary, that it would reduce the credibility of the Council of Europe (where similar Conventions already exist), and that at the same time it would undermine Community institutions, as it does not give the European Court a role. (The UK is opposed to any such extension of the European Court's jurisdiction.) As it is drafted the Convention can only come into force when all Nine have ratified it. However, it has been suggested that the Convention could be modified so as to come into force with less than 9 signatures. The French

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preference is for a Convention which requires 8 ratifications. The Luxembourgers have said they would accept a Convention requiring 7 ratifications. No-one else is keen on this approach. While a Convention among the Nine could have been presented as a measure of European cooperation, it would be much harder to justify (eg to our Parliament) changes in fundamental legal principles for a Convention among a smaller group of countries.

6. The French have given no indication that they are going to raise the Common Judicial Area in the European Council. However, it would be logical for them to do so, since it was the European Council which gave the mandate to senior officials to elaborate the Convention on Cooperation in Criminal Matters. This also represents a last chance for the French to persuade the Dutch to change their minds, since a Convention which did not open for signature before 1 January 1981 would have to be renegotiated with the Greeks.

7. Alternatively the French may press for discussions in the field of civil law. However, there would be little point in trying to create a Common Judicial Area in matters of civil law, since this would duplicate the work of other bodies, eg the Council of Europe and The Hague Conference on Private International Law. So far French proposals in this field have also failed to take account of the existence of separate jurisdictions in England, Scotland and Northern Ireland, and are wholly impractical for the UK.

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POLITICAL COOPERATION AMONG THE NINE

One of the matters which will be considered at a meeting of the Political Directors of the Nine in Luxembourg on 27 October will be the future of a draft Convention on cooperation in criminal matters. This Convention, which is mainly about extradition, has been prepared by a working group of senior officials from the Nine on which both our Departments are represented. The purpose of this letter is to seek your agreement and that of colleagues to whom I am copying this letter for the line which I propose that our representative should take at this meeting.

The Convention is at present so drafted that it would come into effect only when all States which are Members of the Community when it is opened for signature have ratified it. It was originally intended that it should be opened for signature at a meeting of Ministers of Justice in Rome on 19 June. The Netherlands however blocked this at the last minute by saying that they would not be prepared to sign. The Ministers of Justice thereupon asked the working group of officials to consider whether any of the Netherlands objections to the draft Convention could be met by technical changes to the text.

The working group met in Luxembourg last month and established that there were no technical changes that could be made to the text which would enable the Netherlands to change their position. The Netherlands are adamant that they will not

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Secretary of State for [illegible]

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sign the instrument. They have, indeed, gone further and made it clear that they are opposed to the whole concept of a European Common Judicial Area as originally proposed by France, and that their intention is to stop any further progress in that direction.

The working group gave some preliminary consideration to the possibility of amending the draft Convention so that it could come into force with fewer than 9 ratifications. But they concluded (rightly, in my view) that any decision to amend the draft in this way would essentially be a political one. Hence the forthcoming consideration of the matter by the Political Directors.

As you know, we were ready to sign this draft Convention in Rome on 19 June. But our support for the instrument had at least as much to do with its 'European' quality as a measure of Political Cooperation amongst all 9 Member States as with its value as an instrument for facilitating extradition to and from this country. Although our European partners were able to accommodate the United Kingdom position in a number of respects in the draft text, ratification of the instrument would not have been possible before Parliament had approved some important changes in our law. In particular, it would have been necessary to make a considerable extension to the scope of our hitherto somewhat limited extra-territorial jurisdiction. While such changes might have been acceptable to Parliament in the context of an agreement on legal cooperation with all our partners in the Nine I am not so sure of this in the case of an instrument that might come into force with only a selection of them.

I think, therefore, that our representative on the Political Committee should emphasise that our support for the draft Convention had been on the basis that it was an instrument reflecting cooperation between all 9 Member States and that we consider that its value would be greatly diminished if it were an instrument involving only some of the Nine. He might go on to indicate that while the United Kingdom would not want its own preference for a 'Nine-or-nothing' Convention to stand in the way of those States which might want to regulate their mutual extradition practice in accordance with the new Convention, the

UK did not expect that it would wish to join a Convention which would come into force with fewer than 9 ratifications. It would therefore be sensible for those States which still wanted the Convention to come into force to choose a threshold number of ratifications which did not depend on ratification by the United Kingdom. We are likely to be in good company in taking this line: the Danes have said clearly that they will follow the Netherlands in not signing the Convention. The Germans and Irish have indicated at official level that they expect to take a similar line to that which I am proposing.

I should, however, record that the French may demand a high number of signatures as the price for their agreement to ask their legislature to ratify the so-called 'Belgian Agreement' signed by all 9 Member States in Dublin last December. That Agreement would enable the Nine to apply the (Council of Europe) Convention on the Suppression of Terrorism between themselves in a modified way; but the Belgian Agreement can itself only come into force when it is ratified by all 9 Member States. I appreciate that my colleagues may have other views about this, but I myself am not yet persuaded that the advantages of bringing the Belgian Agreement into force (even if we could be certain that ratification by the French would achieve this) are such that it would be worth committing ourselves to the present Convention as a quid pro quo. In fact the Belgian Agreement would probably be of more use to the Irish, for whom it represents a passport to respectability, than it would be to us. As between us and the Irish it would add very little to the reciprocal criminal jurisdiction legislation already in force. Furthermore, there is no intrinsic link between the Belgian Agreement and the present draft Convention. Each instrument can stand on its own, and I propose that our representative should again make this point at the forthcoming meeting. It is only the French who insist on seeing the two matters as a package.

The line I propose largely depends on the one hand on our assessment of the value (or lack of it) of the Convention and the Dublin Agreement and on the other on how serious the Parliamentary difficulties might be when we came to give effect to the Convention. Subject to your views on these points I would see advantage in

making our position clear at the meeting of Political Directors and associating ourselves with those of our partners such as the Germans whose attitude is similar to ours.

I am sending copies of this letter to Quintin Hailsham, George Younger, Humphrey Atkins, Michael Havers and James Mackay and I would be grateful to know as soon as possible whether you and they are content that our representative at the meeting of Political Directors should take the line that I have suggested.

I am also sending a copy of this letter to Sir R Armstrong.

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Ian Gilmour

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Thank you for your letter of 17th October about the draft Convention on co-operation in criminal matters.

I agree with the general line you propose that our Political Director should take, but I do not think we should go quite so far as to suggest that the United Kingdom did not expect that it would wish to join a Convention which would come into force with fewer than nine ratifications. I think you will agree that our principal object should be to keep our options as open as possible, and so on this point I think our position should simply be that as no decision has yet been taken the United Kingdom can not say whether or not it would wish to ratify under these circumstances.

As to the question of a threshold number of ratifications, I think our aim should be to encourage a low number, since this will help to ensure that our options remain open. Otherwise if the threshold were set at, say seven, we might find ourselves under intolerable pressure and our freedom of action curtailed when, in a couple of years time, six member states have fallen in line. There is, of course, logic in a low threshold in any event, since without Community wide status the Convention would become simply an agreement available for the convenience of those member states who want it, and it is difficult to see why those who do want it should be impeded by those who do not. On the other hand it strikes me that we could lose some freedom of action if in pursuing a low threshold we were understood to be saying that whatever the Government's position now, it was unlikely that we would ratify the agreement in the future. I think that some member states might read such an implication between the lines of the argument that the threshold should be low because the United Kingdom's position is at present undecided. But how to achieve our objects at Luxembourg is a matter for you and the Political Director, and I am, of course, entirely happy to leave it to you to judge how best to deploy the arguments so as to keep our options open.

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

Yours ever,
Ian

The Rt. Hon. Sir Ian Gilmour, Bt., M.P.

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