



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 1 June 2012

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JUSTCIV 207

NOTE

from:	Delegation of the United Kingdom
to:	Working Party on Civil Law Matters (General Questions)
Subject:	The Hague Convention of 23rd November 2007 on the International Recovery of Child Support and other forms of Family Maintenance - Note from the delegation of the United Kingdom on data protection issues

1. Delegations will recall the Council Decision on the approval, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and other forms of Family Maintenance¹. In accordance with Article 7 of that Decision, Member States are obliged to notify the Commission of key information relating to their processes for operating the Convention in December 2012.
2. Like other Member States the UK is currently working on implementing legislation for that Convention in order to provide the necessary notifications for that date.

¹ OJ L 192, 22.7.2011, pages 51 to 70

3. An issue has arisen in relation to the protection of personal data which will be transmitted to Contracting States by Central Authorities as required by the provisions of the Convention on administrative co-operation, in particular under Articles 6 and 7. Clearly there are likely to be many occasions on which such co-operation requires the transmission of such data to Contracting States outside the European Economic Area (“EEA”).
- At present, the only Contracting State with which the Union will have relations under the Convention immediately upon conclusion is likely to be Norway, which is within the EEA and therefore no data protection issues arise. However, if the conclusion of the Convention by the Union has the expected effect of encouraging other, non-EEA, States to decide to ratify or accede, the issue of data sharing with such States could begin to arise quite quickly.
4. Under European data protection law, there are restrictions on transmission of such data to non-EEA States arising from Article 25 of the Data Protection Directive¹. There are derogations from the application of this principle (reflected in Article 26) which include the possibility of transfer “*where necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims*”. Clearly, that derogation would appear to provide grounds for data sharing in the context of administrative co-operation under the Convention.

¹ Article 25 reads as follows (as relevant) -

Principles

1. The Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection.

2. The adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country.

5. However, the UK understands that the Article 29 working party¹ does not accept that Article 26 derogations can be relied on automatically, and considers that Article 26 must be strictly interpreted. The UK's Information Commissioner takes the view that such derogations can only be relied on as a "last resort" in individual cases where no other means have been appropriate or available to ensure that the data transaction in question can take place with sufficient protection.
6. Clearly, it will be very difficult and time consuming for Central Authority staff to have to undertake an individual analysis of the sufficiency of protection of a transaction with a non EEA country on every occasion that a transfer is required. Indeed, it would be such a burden that we would say it is impossible. It will also significantly increase the bureaucracy and delay for individual cases under the Convention, which would be contrary to the intention of the Union in ratifying it.
7. The UK has considered what can be done to minimise delay and make the decision making easy for our Central Authority for Convention cases. It would be possible for the UK to enter into negotiations with individual ratifying/ accession non-EEA Contracting States for "memoranda of understanding" to ensure that all data sharing *under the Convention* with such States would take place under agreed conditions that ensured the transferred data was protected.
8. However, there are a number of potential problems with this approach –
 - (a) it is time consuming;
 - (b) the non-EEA Contracting State may not be prepared to give all the necessary guarantees;
 - (c) in accordance with Regulation (EC) No 664/2009, it may be necessary that the Commission is involved in any negotiations to secure an agreement with a third country on data protection issues relating to Maintenance (the UK gives no concluded view upon competence on this issue but simply raises this possibility);

¹ http://ec.europa.eu/justice/data-protection/article-29/index_en.htm. See their paper "Working document on a common interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995" adopted on 25 November 2005 (WP 114). Pages 6 and 7 are particularly relevant.

- (d) individual approaches by different Member States to this problem could lead to a fragmentation and variation of practice in data sharing across the Union vis a vis other Contracting States, which could be confusing and undesirable for everyone concerned, especially maintenance creditors.
9. In time, there will doubtless be proposals from the Commission to accept new accessions to the Convention. The UK takes the view that before such accessions can be accepted, there needs to be clarity about the protection that each such State will provide to personal data that has to be transferred for Convention purposes.
10. The UK suggests that the Commission should take the lead on considering this issue in relation to each new accession. There is a power for the Commission to approve non-EEA States for data sharing purposes under Chapter VI of the Data Protection Directive. This does not need to be a general approval for the data protection provisions of each State – it can be limited to transfers for the purposes of the Convention. Once adequacy of the other State's systems are established, the proposal for accession can be considered with confidence by Member States.
11. The UK would welcome a discussion on this proposal at the working group on the 11th June.
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